No. 2601

United States

Circuit Court of Appeals

For the Ninth Circuit.

OLD COLONY TRUST COMPANY, as Trustee,
Appellant,

vs.

THE CITY OF TACOMA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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Names and Addresses of Attorneys.

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Attorneys for the Appellant.

T. L. STILES, Esquire, City Hall, Tacoma, Washington, and

FRANK M. CARNAHAN, Esquire, City Hall, Tacoma, Washington.

Attorneys for the Appellee. [1*]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 18—E.

OLD COLONY TRUST COMPANY, a Corp., Appellant,

vs.

CITY OF TACOMA,

Appellee.

Stipulation [as to Record on Appeal, and Waiving Act of February 13, 1911].

IT IS HEREBY STIPULATED BY AND BETWEEN the parties hereto that the following will constitute the record on appeal in the above cause; typewritten copies of the following papers, omitting all captions, verifications, acceptances of service and other endorsements, excepting file marks. I hereby waive the provisions of the Act of February, 1911, in re printing of transcripts on appeal:

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*Page-number appearing at foot of page of Original Certified Transcript of Record.

1. Stipulation.
2. Bill of Complaint.
3. Motion for Temporary Injunction.
4. Answer.
5. Decision on Temporary Injunction.
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14. Bond on Appeal.
16. And that no exhibits be copied but that the original exhibits be sent to the Circuit Court of Appeals with the transcript, for the examina- of that court.

JAMES B. HOWE,
JNO. A. SHACKLEFORD,
Attorneys for Appellant.
T. L. STILES,
City Atty.,
Attorney for Appellee.

[Endorsed]: "Filed in the U. S. Dist. of Washington, Southern Division. Feb. 13, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy." [3]

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States, for the Western District of Washington, Sitting in Equity:

Old Colony Trust Company, a corporation created and existing under the laws of the State of Massachusetts and authorized to do business in the State of Washington, brings this its Bill of Complaint as trustee against the City of Tacoma, a municipal corporation created and existing under the laws of the State of Washington, located in the County of Pierce, in the Southern Division of the Western District of Washington.

And thereupon plaintiff complains and alleges:

I.

The plaintiff at all times hereinafter mentioned was and now is a corporation created and existing under the laws of the State of Massachusetts, and was and is a citizen and resident of the State of Massachusetts, and not a citizen and resident, or either, of the State of Washington.

II.

The defendant, the City of Tacoma, at all times hereinafter mentioned was, and now is a municipal corporation of the first-class created and existing under the laws of the State of Washington, located in the County of Pierce, and in the Southern Division of the Western District of Washington.

III.

That at all of said times the Tacoma Railway & Power Company, hereinafter called the Power Com-

pany, was and now is a corporation created and existing under the laws of the State of New Jersey, engaged in the operation of street railway lines and power lines for the purpose of conveying electric [4] power in the City of Tacoma, in the State of Washington.

IV.

On the 1st day of April, 1899, the Tacoma Railway & Power Company, in order to raise money to carry out the objects for which it was incorporated and to enable it to discharge its duties in the County of Pierce and State of Washington, executed and delivered to the plaintiff a mortgage or deed of trust upon the franchises and all of the property, real, mixed and personal, which the Tacoma Railway & Power Company then owned and all which it might thereafter acquire, to secure an issue of $1,500,000 of negotiable first mortgage bonds of the Power Company, bearing interest at the rate of five per cent per annum, payable semi-annually, which said mortgage the plaintiff duly executed as trustee and accepted the trust imposed upon it, and said mortgage was thereafter recorded and has ever since been of record in the office of the Auditor of Pierce County, State of Washington, as a real and chattel mortgage. Thereafter the bonds mentioned in said mortgage were duly issued to the amount of $1,500,000, and such bonds are now outstanding to the amount of upwards $1,300,000.

V.

Among the franchises which became subject to the lien of said mortgage was that certain franchise granted by the City of Tacoma to the Tacoma Rail-

way & Power Company by Ordinance No. 2295, entitled "An ordinance granting to the Tacoma Railway & Power Company, a corporation, the right, franchise and privilege to construct and maintain poles, lines, underground conduits, string wires thereon and therein, and maintain the same and to transmit thereover electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance [5] No. 55." Said ordinance was duly passed by the City Council of the City of Tacoma, and thereafter, on February 9, 1905, duly approved. Said ordinance as enacted was to continue in force and effect for twenty-five years from February 9, 1905, unless sooner terminated according to its provisions.

VI.

In the course of its business and with funds derived from the sale of some of the bonds secured by said mortgage, the Power Company purchased certain poles, wires and electric appliances, all of which, before the erection of the same as the power lines hereinafter mentioned, became subject to the lien of said mortgage, and said poles, wires and electric appliances, after becoming so subject to the lien of such mortgage, were used by the Power Company in constructing certain lines for the transmission and distribution of electricity for use for power purposes, which said lines were thereafter operated for such purpose by the Power Company.

VII.

The City of Tacoma now claims to be the owner of such poles, wires and electric appliances free from the lien of the plaintiff's mortgage.

VIII.

In the year 1908 the City of Tacoma authorized the Power Company to furnish electricity for lighting purposes, subject to the right of the City to revoke such permit. In December, 1908, and while said permit was in force the Power Company entered into a contract with the Northern Pacific Railway Company, wherein the Power Company agreed to furnish to the Railway Company at its depot in the city and at its shops in South Tacoma electric power. The Power Company thereafter [6] continued to furnish power to the Northern Pacific Railway Company. The power so furnished was delivered by the Power Company to the Northern Pacific Railway Company upon the premises of the Railway Company at a voltage of 2300 volts, which voltage was too high to be used for lighting purposes. The Northern Pacific Railway Company transformed such power to such lower voltage as enabled it to use the same for lighting and other purposes. That at all of said times the City of Tacoma was not able to furnish to the Railway Company the power service which the Railway Company desired to receive, and which was then being furnished by the Power Company.

IX.

On April 2, 1913, the City Council of Tacoma adopted a resolution, which was as follows:

"WHEREAS, under the provisions of Amendment No. XVI, to The Charter of the City of Tacoma of 1890, and of Ordinance No. 2295, the Tacoma Railway and Power Company has been permitted, tem-

porarily, to supply electric current in said City to persons and corporations who have used the same directly or indirectly for lighting purposes; and

WHEREAS, it is no longer expedient or permissible that such authority be exercised by said Company; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TACOMA:

That any and all permits to the Tacoma Railway and Power Company to furnish electric current to persons or corporations in the City of Tacoma, to be used for lighting purposes, be and the same are hereby revoked; and that said Tacoma Railway & Power Company from and after the 15th of April, 1913, cease to furnish or supply to any person or corporation in the City of [7] Tacoma any electric current for lighting purposes; and

RESOLVED, That the City Clerk forthwith deliver to said Tacoma Railway & Power Company a certified copy of this resolution."

After the passage of said resolution and before the 21st day of April, 1913, the Power Company asserted the right under its franchise to sell electric power to the Northern Pacific Railway Company at a voltage too high for lighting purposes and that the transformation by the Northern Pacific Railway Company of such power upon its premises to a voltage low enough for lighting purposes was not a violation of the franchise. That if the City claimed the Power was without authority to sell such power the City should institute suit to enjoin the Power Company from continuing to sell such power. The Com-

mission of Light and Water of the City of Tacoma, the said commissioner being the officer in charge of the operation of the water and electric plants of the City of Tacoma, informed the said manager of the Power Company that it was the desire of the City of Tacoma that said Power Company continue to furnish electricity to said Railway Company in the same manner that such electricity had theretofore been furnished until such time as the rights of the Power Company and of the City could be determined, and said Commissioner with the manager of the Power Company consulted the City Attorney of said City, and said City Attorney advised said Commissioner that there was no objection to such continuation of service by said Power Company to said Railway Company until a determination of the rights of the parties could be had. Prior to the 21st day of April, 1913, it was arranged and agreed between the City Attorney of said City and the manager of said Power Company that the question of the right of the Power Company [8] to serve the Northern Pacific Railway Company would be tested by an injunction suit to be brought by the City of Tacoma, and said manager was informed by both said Commissioner and said City Attorney that no action would be taken by the City for the purpose of forfeiting the franchise of said Power Company.

About the 21st day of April, 1912, said manager was advised by the City Attorney that the City did not desire to bring suit to enjoin the Company from furnishing power to the Railway Company for lighting purposes, as the City was bound by its own ordinances, and it was unnecessary for it to bring a suit

to enforce its ordinance, but that the proper course would be that the Power Company should institute a suit against the City to prevent the City from interfering with the City, and that in such suit the City would not oppose the granting of a restraining order. At that time the said manager had an agreement with the City Attorney, the Commissioner of Light and Water and the Commissioner of Public Works, that the Company during the pendency of such suit should continue to furnish electricity to the Railway Company until the whole matter should be finally disposed of. Pursuant to such understanding and in order to enable the company to make a test suit, the City Council on the 21st day of April, 1913, adopted the following resolution:

"WHEREAS, it appears that the Tacoma Railway & Power Company grantee of the franchise created by Ordinance No. 2295, entitled:

> 'An ordinance granting to the Tacoma Railway and Power Company, a corporation, the right, franchise and privilege to construct and maintain pole lines, underground conduits, string wires thereon and therein and maintain the same, and to transmit thereover electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance No. 551,'

is contrary to the terms and conditions of said ordinance, supplying electric current to be used directly and indirectly for [9] lighting purposes, and to run motors, dynamos and other machines by which electric current is generated for lighting purposes, to persons, firms, associations and corporations

in the City of Tacoma; NOW, THEREFORE,

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TACOMA:

That for the said violation of said franchise it is the intention of the Council of said City to repeal said Ordinance No. 2295 and revoke the privileges granted thereby, unless the said violations shall cease within thirty days after the giving of the notice hereinafter provided for; and

RESOLVED; That the Commissioner of Public Works serve notice of the intention to repeal said ordinance upon said Tacoma Railway and Power Company, to the effect that if said failure to comply with the terms and conditions of said ordinance is not corrected before the expiration of thirty days after such service, the City of Tacoma will consider the franchise granted by said ordinance null and void and absolutely of no effect because of such failure; and will claim forfeiture to it of all poles, wires, lines and other property that may have been located or constructed in pursuance of said ordinance within said City, unless the same be removed within sixty days thereafter; and that the council of said City will repeal said ordinance."

Prior to the expiration of thirty days from the date of such resolution, with the exception of the Northern Pacific Railway Company, the Power Company was not furnishing power which was used for light to any one, and continued to furnish power to the Northern Pacific Railway Company only because of the understanding that until the whole matter of the right of the com-

pany to furnish electricity to the Railway Company should be finally determined, the continuance to so furnish power should not be claimed [**10**] by the City as a ground of forfeiture. A copy of the resolution of April 21, 1913, was served upon the Power Company April 23, 1913.

X.

Pursuant to such understanding and on May 22, 1913, the Power Company instituted suit in the Superior Court of the State of Washington, for Pierce County, against the City of Tacoma to enjoin the City from enforcing a forfeiture of the franchise, and of any of the right and privileges of the Power Company granted thereby, and from claiming the forfeiture of the poles, wires and other property located under such ordinance, and from interfering with such poles, wires and appliances in any manner; and in such suit prayed that a temporary injunction be granted restrain*ed* the City from taking any such action until the final hearing and determination of the suit.

On the 23d day of May, 1913, the City served its answer and cross-complaint, purporting to claim a forfeiture of the franchise. The suit was tried on June 6, 1913.

On June 14, 1913, a decree was entered adjudging, among other things, as follows:

That the franchise and privilege granted the Tacoma Railway & Power Company by said Ordinance No. 2295 had been forfeited for failure to perform the obligations of said ordinance, and adjudged said franchise to be null and void and of no further effect,

and adjudging that said Tacoma Railway & Power Company was no longer entitled to do any of the things permitted by said ordinance, except to remove its poles, lines and other property from the streets and alleys of the City, and said decree also further provided "That unless the said Tacoma Railway & Power Company within sixty days after the [11] entry of this decree removes its poles and wires and other property from the streets and alleys and public places of the City of Tacoma, the same shall thereupon become forfeited to and be the property of the City of Tacoma."

At the time when the said judgment and decree was rendered and made and entered, the Tacoma Railway & Power Company in open court gave notice that it appealed from said judgment and decree and from each and every part thereof, to the Supreme Court of the State of Washington, and the Court at said time and place ordered, upon the filing with the clerk of the court of a bond with surety in the penal sum of $1000.00, conditioned among other things that said Company would satisfy and perform the judgment or order appealed from in case it should be affirmed, that all proceedings under said judgment should be stayed and that said judgment should not become effective pending said appeal to the Supreme Court and said order made at said time contained the further provision as follows:

"It is the intention of this order that the running of the sixty-day period allowed for the removal of poles and wires from the streets shall be suspended during the pendency of this appeal."

In accordance with said order on the 14th day of June, 1913, the Tacoma Railway & Power Company duly filed an appeal bond and supersedeas bond, conforming to the statutes of the State of Washington, and to the provisions of said order.

The said cause on appeal came on for hearing before Department Numbered One of the Supreme Court of the State of Washington, and on May 7, 1914, an opinion was handed down to the effect that said judgment and decree should be affirmed. Within thirty days thereafter a petition for rehearing of [12] said cause in the Supreme Court of the State of Washington was duly filed by the Tacoma Railway & Power Company, and on June 21, 1914, said petition for rehearing was denied, and a remittitur to the Superior Court affirming said judgment and decree was mailed to the clerk of said Superior Court, and said Remittitur was received by said clerk and by him filed in his office on the 22d day of June, 1914.

XI.

The plaintiff was not a party to any of said litigation, nor did it have either notice or knowledge of any of the proceedings therein nor of any act of the City of Tacoma for the purpose of forfeiting the franchise of the Power Company or to acquire any interest in the line constructed under such franchise nor did the plaintiff then have any notice or knowledge of any act of the Power Company in respect thereto.

XII.

The value of the poles and wires which the city

lays claim to free from the lien of the plaintiff's mortgage, and the value of the plaintiff's lien thereon, exceeds $5,000.00, and the value of the franchise and of the plaintiff's lien thereon involved in this suit exceeds $5,000.00, and the amount and value in dispute in this suit exceeds the sum of $25,000.00, exclusive of interest and costs.

XIII.

The pole lines hereinbefore mentioned, and the franchise under which they were constructed, maintained and operated, were all used to serve the general public, and any interference with the use and any forfeiture of the franchise would inconvenience and damage the general public and many citizens of the City of Tacoma as well as the Company rendering the service to them, and **[13]** also the plaintiff. The bonds secured by the mortgage hereinbefore mentioned to the plaintiff as trustee are outstanding and have a long time yet to run, and the physical property which is in controversy and upon which said mortgage is a lien of such a character, that if it passes into the possession of the City of Tacoma, it will become difficult of identification, and in many cases portions thereof will be lost and destroyed while other portions will be used by the City of Tacoma to injure the business authorized to be done under franchise granted by the City of Tacoma, upon which franchise the plaintiff has a lien by virtue of its mortgage; and if said poles and wires pass into and remain in the hands of the City of Tacoma for any considerable length of time, the plaintiff will be unable to realize for the bondholders any value

that said poles and wires now have.

XIV.

The physical property hereinbefore mentioned is subject to the lien of the plaintiff's mortgage, and the City of Tacoma seeks to obtain the exclusive possession of such property free from the lien of the plaintiff's mortgage. If such property be taken into the possession of the City of Tacoma, and if the plaintiff does not protect the security of the bonds secured by the mortgages executed to it, the bondholders will suffer great and irreparable loss and damage.

The proceedings on the part of the City of Tacoma to forfeit the franchise and the title to the property operated thereunder having been taken and had without any notice to the plaintiff, and being proceeds to which the plaintiff was not a party, the same, if given effect, will deprive the plaintiff of its property without due process of law, and will deny to it the equal protection of the law in violation of the Fourteenth **[14]** Amendment of the Constitution of the United States.

XV.

The plaintiff has no plain or adequate remedy at law, and unless an injunction be granted enjoining the defendant from interfering with the franchise and the physical property mentioned in this complaint, the lien of the plaintiff will be lost or destroyed, and the plaintiff and the bondholders for whom it is trustee will be irreparably injured and damaged, and unless a temporary injunction be granted enjoining the defendant from interfering

with the property during the pendency of this suit, the defendant will not only remove certain portions of the physical property so that they cannot be subject to the lien of the plaintiff's mortgage, but will prevent the same from being used to served persons with power unless such persons take such power from the City of Tacoma only, and then such poles and wires will be used by the City of Tacoma to give service, and irreparably injure and damage the business done under the franchise upon which the plaintiff's mortgage is a lien, and deprive the plaintiff of the revenue from such source, and such injury will be done by defendant daily during the pendency of this suit.

Forasmuch as the plaintiff can have no adequate remedy, except in this court, and to the end, therefore, that the defendant may, if it can, show why the plaintiff should not have the relief prayed, and make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to the matters in this Bill hereinbefore stated, but not under oath (an answer under oath being hereby expressly waived)—

Plaintiff prays that a provisional or preliminary injunction [15] be issued restraining the defendant, the City of Tacoma, its officers, agents and employees from taking any step whatsoever to forfeit the franchise granted by Ordinance No. 2295, and from making any claim that such franchise has been forfeited, and from taking any steps whatsoever

interfering with the poles, wires and electrical appliances constructed thereunder, and from asserting title thereto during the pendency of this suit, and that upon final hearing and determination of this suit all acts of the defendant in reference to said franchise and said property be decreed to be null and void, and the defendant forever enjoined from enforcing or attempting to enforce any proceeding claiming a forfeiture of said franchise for any matter heretofore occurring, and from making any assertion of title to any of said property; and the plaintiff prays that it have such other and further relief as the equities of the case may require and to the Court may seem meet and for its costs and disbursements herein.

May it please your Honors to grant unto the plaintiff, not only a writ of injunction conformable to the prayer of this Bill, but also a writ of subpoena of the United States directed to the said City of Tacoma commanding it on a day certain to appear and answer unto this Bill of Complaint, and to obey and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

OLD COLONY TRUST COMPANY,
By JAMES B. HOWE,
Its Solicitor.

[Endorsed]: "Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 6, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy." **[16]**

Motion [for Temporary Injunction].

Now comes the Old Colony Trust Company, plaintiff in the above-entitled suit, and, upon the Bill of Complaint filed therein, moves the Court for an order granting a temporary injunction restraining the defendant from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance No. 2295 of the City of Tacoma has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance in the City of Tacoma, and from asserting any right, title or interest in said poles, wires and lines by reason of any forfeiture of said franchise, and from taking any steps whatsoever to interfere with said poles, wires and lines, or any of them, during the pendency of this suit.

JAMES B. HOWE,
Solicitor for Plaintiff.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 7, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. **[17]**

Answer.

Now comes the above-named defendant, City of Tacoma, and appears in the above-entitled cause and answers the plaintiff's Bill of Complaint as follows:

I.

It objects and demurs to the said Bill of Complaint as a whole upon the ground that the same does not

state facts sufficient to constitute a cause of action in equity against this defendant.

II.

It admits the allegations contained in Paragraphs I, II and III of said complaint except that it alleges that said Tacoma Railway & Power Company was not engaged in the operation of power lines until the year 1905.

Admits the allegations contained in Paragraph IV.

Denies that the franchise granted by Tacoma Ordinance 2295 *because* at any time subject to the lien of plaintiff's alleged mortgage, but admits the other allegations contained in Paragraph V of said complaint.

Denies each and every allegation contained in Paragraph VI of said complaint except that it admits that said Power Company constructed certain power lines in the streets of said city pursuant to the authority granted by said Ordinance 2295, which power lines the City of Tacoma now claims to own, free from any alleged lien of plaintiff's said mortgage, as alleged in Paragraph VII of said complaint.

Admits that in 1908 said City gave said Power Company a permit to furnish electricity for lighting purposes as provided for in said ordinance as hereinafter set forth; and admits that **[18]** said Power Company entered into a contract with the Northern Pacific Railway Company for electric power, but defendant alleged that plaintiff, well knowing that it had no lawful authority to do so, contracted for said power for ten years, and expressly bound said Railway Company to use its current for lighting as well

as power purposes during all of said time.

Denies that said city was not able to furnish power to said Railway Company.

Admits the allegations contained in Paragraph IX of said complaint and relating to the passage of the Resolutions set forth therein, and to the assertions of right made by said Power Company, but denies each and every other allegation contained in said paragraph, and specifically denies that the Commissioner of Light and Water of the City of Tacoma, the said Commissioner being the officer in charge of the operation of the water and electric plants of the City of Tacoma, informed the said manager of the Power Company that it was the desire of the City of Tacoma that said Power Company continue to furnish electricity to said Railway Company in the same manner that such electricity had theretofore been furnished until such time as the rights of the Power Company and of the City could be determined; or that said Commissioner with the Manager of the Power Company consulted the City Attorney of said City, or that said City Attorney advised said Commissioner that there was no objection to such continuation of service by said Power Company to said Railway Company until a determination of the rights of the parties could be had; or that prior to the 21st day of April, 1913, it was arranged and agreed between the City Attorney of said City and the manager of said Power Company that the question of the right of the Power Company to [19] serve the Northern Pacific Railway Company would be tested by an injunction suit to be brought by the

City of Tacoma; or that said manager was informed by both said Commissioner and said City Attorney or either of them that no action would be taken by the City for the purpose of forfeiting the franchise of said Power Company; or that about the 21st day of April, 1913, said manager was advised by the City Attorney that the City did not desire to bring suit to enjoin the Company from furnishing power to the Railway Company for lighting purposes, as the City was bound by its own ordinances, and it was necessary for it to bring a suit to enforce its ordinance, but that the proper course would be that the Power Company should institute a suit against the City to prevent the City from interfering with the Company, and that in such suit the City would not oppose the granting of a restraining order; or that at that time the said manager had an agreement with the City Attorney, the Commissioner of Light and Water, and the Commissioner of Public Works, or either of them, that the Company during the pendency of such suit should continue to furnish electricity to the Railway Company until the whole matter should be finally disposed of; or that pursuant to such or any understanding or in order to enable the Company to make a test suit, the City Council on the 21st day of April, 1913, adopted a resolution; or that during the 30 days after the passage of the Resolution the Tacoma Railway & Power Company was not furnishing power which was used for the production of light to anyone except the Northern Pacific Railway Company, or that it continued to furnish power to the Northern Pacific Railway Com-

pany only because of the said alleged understanding that until the whole matter of the right of the company to furnish electricity to the Railway Company should be finally determined, the continuance to so furnish power should not be claimed by the City as a ground of forfeiture, or because of any understanding whatever.

Admits the allegations contained in Paragraph X of said [20] complaint except that it denies that said action was commenced pursuant to the understanding theretofore alleged or to any understanding whatever; and denies that said Superior Court made any such order as is alleged to have been made preventing the taking effect of said judgment; and alleges that not until after said judgment had been entered and said Power Company had applied to the Court to fix the amount of a supersedeas bond, was any order made at all, and said order had no effect whatever upon any matter in the cause, because the filing of the bond automatically effected a stay under the statutes of the State.

Admits that plaintiff was not made a party to said action; but denies that it did not have notice and knowledge of the proceedings therein; and alleges that through its counselors, attorneys and agents it had full notice and knowledge of every step taken in said forfeiture proceeding.

Admits that the value of the poles and wires which defendant lays claim to exceeds $5,000, but denied each and every other allegation contained in Paragraph XII of said complaint.

Denies each and every allegation contained in

Paragraphs XIII, XIV and XV of said complaint; and defendant alleges that the property actually covered by plaintiff's mortgage is amply sufficient to secure all of said bonds and the interest thereon, many times over.

And for its further, affirmative defense to plaintiff's complaint herein, defendant alleges:

I.

That the said mortgage of the Tacoma Railway & Power Company to plaintiff covered only specific street railway franchises and real and personal property held, owned and used by said Company in connection with its operation of street railways in the City of Tacoma, and such additional street railway **[21]** property as it should thereafter acquire, and never covered or was intended to cover the pole lines, wires and other property constructed pursuant to said Ordinance No. 2295; and plaintiff had no lien upon or claim to said property or franchise by reason of said mortgage.

And for its further affirmative defense to plaintiff's complaint, defendant alleges:

I.

That ever since the year 1893 the City of Tacoma has owned, maintained and operated a municipal electric light and power plant to furnish itself and its inhabitants with electric light and power for public and private use.

II.

That at all the times since March 7, 1896, the Charter of said city, adopted by its freeholders, contained the following provision:

"The legislative power of the City is forever prohibited from granting to any person or corporation whatever, a franchise, privilege or right to sell or supply water or electric lights within the City of Tacoma, to the City or any of its inhabitants as long as the City owns a plant or plants for that purpose, and is engaged in the public duty of supplying water or light; except that the City council may *f*rant a franchise to supply water or electric light to any section or part of the City of Tacoma not supplied or furnished by the city water or light plant, to cease and determine at such time as the City of Tacoma shall furnish and provide water and light in said section or part of the City."

III.

That pursuant to said Charter provision said Ordinance No. 2295 expressly limited the right granted to the Tacoma Railway & Power Company to the furnishing of electric current for power and heat, and contained the following provision:

"*Provided,* that neither said Tacoma Railway and Power Company, nor its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes, or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association [22] or corporation, except, where the grantee herein, its successors or assigns, may furnish current for street railway purposes, then and in that event current may be

sold for lighting street-cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway and Power Company, its successors and assigns, the right to sell power for power and heating purposes and for lighting street-cars; but in no event, except as hereinafter provided, shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for lighting; provided further, however, that nothing in this section contained shall prevent said City from granting the said Tacoma Railway and Power Company, its successors and assigns, by special permit, the right to furnish any person, firm or corporation within said City, or said City, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the City."

IV.

That the permit granted to said Company was granted subject to said Charter and Ordinance right of revocation.

V.

That said Ordinance No. 2295 contained many other conditions subsequent upon the performance of which the right of said Company to continue to hold the franchise granted thereby depended, and it provided as follows:

"Sec. 11. That each and every right, privilege and authority and franchise by this ordi-

nance granted shall, without the passage of any resolution, ordinance, or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said City, under the directions and authority of the City Council of said City to the effect that said City will, if said failure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles, lines, wires or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless [23] the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall

thereupon become and be the property of said City of Tacoma."

and,

"Sec. 17. This grant is subject to the right of the City Council at any time, on thirty days' written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authority so to do, hereafter to repeal, change or modify this grant, if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the City Council reserves the right so to do and this section shall be considered as a cumulative and and an additional remedy to that provided by section 11 of this ordinance."

VI.

And said ordinance further provided that said City should have the right at any time to purchase any and all property of said grantee, erected, constructed and maintained under the terms and provisions of said ordinance, upon payment of a reasonable price therefor.

VII.

And said ordinance further provided that the grantee should be deemed to have forfeited and abandoned all rights thereunder if it failed to file an acceptance thereof, subject to its terms, conditions, stipulations and obligations, within sixty days after approval; and that in case of its failure to accept, the ordinance should be null and void and of no effect whatever; and said grantee did file such an acceptance.

VIII.

That upon the adoption of the resolution mentioned and set forth in Paragraph IX of the complaint herein, on the 2d day of April, 1913, said Tacoma Railway and Power Company refused to cease furnishing electric current for lighting purposes, and declared that under authority of what is known [24] as the "Public Service Act" of the State it could and would furnish electric current in the City of Tacoma for any and every purpose, including light, wherever it saw fit and whether said ordinance permitted it or not.

And thereupon, as expressly stipulated in said ordinance might be done, the Council of said City on the 21st day of April, 1913, adopted the second resolution set forth in Paragraph IX of said complaint, and caused the same to be served on said company.

And said company failed and refused to comply with the terms of said ordinance or the demand of said resolution, and on the 29th day after the service of said resolution upon it, commenced its said action in the Superior Court of Pierce County, Washington, in which it prayed the decree of the Court enjoining said city from repealing said Ordinance No. 2295, or declaring the same null and void, and from claiming a forfeiture of the poles, wires or other property that had been located or constructed pursuant to said ordinance within said City, and from interfering with the use by the plaintiff of said poles, wires, appliances and other property in the

manner in which said plaintiff had theretofore used the same.

And defendant for its further affirmative answer to the complaint herein,

I.

Alleges that heretofore and on the 2d day of September, 1914, the Council of said City duly passed an ordinance, No. 5892, entitled:

> "An ordinance to repeal Ordinance No. 2295, approved February 9, 1905, and entitled: 'AN ORDINANCE granting to the Tacoma Railway and Power Company, a corporation, the right, franchise and privilege to construct and maintain poles, lines, underground conduits, string wires thereon and therein and maintain the same, and to transmit thereover [25] electricity for the purpose of furnishing power and heat within the City of Tacoma, and repealing Ordinance No. 551' ";

whereby said ordinance No. 2295 was repealed, and said ordinance was duly published on the 3d day of September, 1914, and is in full force and effect.

And defendant for its further affirmative answer to the complaint herein.

I.

Alleges that it had no knowledge or information whatever that plaintiff had or claimed to have any lien upon said franchise granted by said Ordinance No. 2295 by virtue of its said mortgage or otherwise, or had any knowledge or information that any such mortgage existed; and that whatever right or lien

plaintiff may have in or upon said franchise or the property used in connection therewith, is and always was second, subordinate and inferior to the rights of the City of Tacoma, expressly reserved by the City Charter and said ordinance; and that in no event was the plaintiff entitled to notice of proceedings taken by the Council of said City to enforce the provisions of said ordinance to repeal the same.

WHEREFORE, having fully answered the complaint herein, defendant prays that the same be dismissed with costs.

T. L. STILES,
City Attorney,
FRANK M. CARNAHAN,
Assistant City Attorney,
Attorneys for Defendant.

(Verified.)

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Oct. 19, *1915*. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [26]

Memorandum Decision, Filed December 18, 1914.

ON APPLICATION FOR TEMPORARY INJUNCTION.

JAMES B. HOWE, for Complainant.

T. L. STILES, FRANK M. CARNAHAN, for Defendant.

CUSHMAN, District Judge.

This matter is before the Court upon the application of complainant for a temporary injunction.

The primary questions involved are the same as those considered in Tacoma Railway & Power Company, v. the City of Tacoma (79 Wash. 508) and Puget Sound Traction, Light & Power Company v. City of Tacoma (decided by this Court, September 19, 1914).

The present case differs from the two foregoing in that, while in those two cases the controversy was waged between the city on one hand, contending for, and the Tacoma Railway & Power Company and Puget Sound Traction, Light & Power Company, respectively, on the other, opposing, the forfeiture [27] of its franchise for electric power, on account of furnishing electric power for lighting purposes, in violation of its terms, while the present suit is brought by the Old Colony Trust Company, the trustee of the mortgage bondholders of the Tacoma Railway & Power Company, not a party to the former litigation.

The present suit differs further in that complainant seeks to avoid the forfeiture of the franchise, declared by the city, upon the ground that, through fraud and mistake, the officers of the Tacoma Railway & Power Company were induced to fail to comply with the city's requirements, imposed as a condition for the avoidance of forfeiture.

These differences necessitate the determination of the questions involved as in an original suit.

Old Colony Trust Co. v. Omaha, 230 U. S. 100.

The jurisdiction of the Court, being properly invoked, its exercise cannot be avoided.

Ex parte Young, 209 U. S. 223.

The exercise of discretion in the matter of granting such injunction should be controlled by consideration of the comparative damage which may result to one party or the other from granting or denying such injunction.

Thullen v. Triumph Elec. Co., 212 Fed. 143;
Pac. Tel. & Tel. Co. v. Los Angeles, 192 Fed. 1009;
Love v. Atchison T. & S. F. Ry. Co., 185 Fed. 321;
Irving v. Joint Dist. Council etc., 180 Fed. 896;
Colgate v. James T. White & Co., 169 Fed. 887; [28]
Pere Marquette R. Co. v. Bradford, 149 Fed. 492;
Buffalo Gas. Co. v. Buffalo, 156 Fed. 370;
DeKoven v. Lake Shore & M. S. Ry. Co., 216 Fed. 955.

It is manifest that, should the injunction not be granted and the City should remove the poles and wires, alleged to have been forfeited, destroying the plant and interrupting the business of complainant, and it should transpire that the complainant ultimately prevail, the damage would be irreparable, even though the City be solvent, for the extent of the damage cannot be ascertained with reasonable certainty.

The violation of its franchise, which was asserted by the City as a ground for its forfeiture, was the furnishing, by the operating company under its franchise, of electric current to the Northern Pacific Railway Company to be used for lighting purposes.

Pending litigation over the question of forfeiture, the following proposition was made by such company to the city and has been, by the latter, approved and accepted:

> "In accordance with resolution by the City Commission June 2, 1913, the Tacoma Railway and Power Company hereby agrees (pending the present litigation concerning Ordinance No. 2414) to purchase, and the City of Tacoma agrees to supply, electrical energy of an equivalent amount in kilowatt hours to the amount of power which the Tacoma Railway and Power Company supplies on and after June 2, 1913, during said litigation, to the Northern Pacific Railway Company for power purposes,—a proportion of which current the City claims is being used for lighting purposes, and in addition will purchase from the City such amount of electrical energy as may be determined is being used during the same period by the Tacoma Grain Company, the Sperry Flour Company, and other customers of the Tacoma Railway & Power Company, for lighting purposes,—the electrical energy to be delivered by the City of [29] Tacoma to the Tacoma Railway and Power Company in the amount as above outlined at the 19th Street Sub-station of the Puget Sound Traction, Light & Power Company in the form of twenty-two hundred volt, two-phase alternating current. The Tacoma Railway and Power Company will guarantee a load factor of 100% for current so delivered, and will take

such current at the now prevailing rate for industrial power at 100% load factor as now fixed by Section 19 of Ordinance No. 5283 of the City of Tacoma as passed April 10, 1913."

It is apparent that the City seeks, primarily, the establishment of its right to forfeit the franchise, the poles and wires located in its streets and used thereunder. The damage, if any, to the City for the delay in the final establishment of its right is, therefore, capable of computation and comparatively easy of adjustment, if protected by a sufficient bond.

On account of this disparity in the effect upon the parties of granting or withholding the injunction, and the closeness of the questions involved, the temporary injunction will be granted, without determining the question of whether the complainant will probably ultimately prevail or not. The issue of fraud, alone, is of such a nature—so dependent upon circumstances, and the range of admissible evidence is so great that any conclusion reached upon *ex parte* affidavits is bound to be unsatisfactory.

But before issuance of the temporary injunction, counsel for the parties will be heard as to the amount of the bond. The present status, as affected by the arrangement made between the City and the operating company is to be preserved and there is no intention to allow, under the protection of the injunction, the furnishing of electric current for lighting purposes by the company. [30]

[Opinion.]

Filed Jan. 20, 1915.

JAMES B. HOWE, JOHN A. SHACKLEFORD, for Complainant.

T. L. STILES, FRANK M. CARNAHAN, for Defendant.

CUSHMAN, District Judge.

Suit is brought by complainant, mortgagee of the property of the Tacoma Railway & Power Company, asking that the defendant City be enjoined from taking any steps to forfeit a franchise granted the mortgagor for electric power purposes by a certain city ordinance and from asserting title to, or attempting to control the electric appliances constructed thereunder.

Suit was brought to enjoin the forfeiture of this franchise in the State court by the mortgagor, in which suit the City secured a decree forfeiting the franchise and property used under it. The complainant in the present suit was not a party to such litigation and there is no evidence that it had notice thereof. Upon appeal, the Supreme Court of the State of Washington, affirmed [31] that decree. (Tacoma Ry. & P. Co. v. City of Tacoma, 79 Wash. 508.)

This Court in a suit by the grantee of the Tacoma Railway & Power Company, under a transfer made after the rendition of the opinion in the foregoing case by the Supreme Court, but before entry in the trial court of the remittitur, refused an injunction,

forbidding the City interfering with the property installed under the franchise, forfeited to the City by the ruling of the State court. (P. S. T., L. & P. Co. v. City of Tacoma, 217 Fed. 265.)

This Court has already held in the present suit, upon the authority of Old Colony Trust Co. v. Omaha (230 U. S. 100), that complainant was not, necessarily, concluded by the decree in the State Court against its mortgagor, the Tacoma Railway & Power Company, to which suit it was not a party.

Upon the consolidation of certain street railway companies, the mortgage in question was given, in 1899, to the complainant herein. The power franchise in question was not granted until 1905, some six years after the giving of the mortgage.

While it appears in the mortgage that the company was mainly engaged in a street railway business, it must be assumed that the Articles of Incorporation of the Tacoma Railway & Power Company authorized it to engage in the power business, else the franchise would not have been granted. The name of the company, also, indicates that it was to engage in the power, as well as street railway business.

The mortgage covers much property. By its terms, it was to cover "all this company's property, both personal and real and both now and hereafter acquired." After this general language, a large amount of property is described in detail, including franchises, under many particular ordinances. After which occurs the **[32]** following language:

> "Also, any and all other franchises, rights and privileges hitherto granted by said City of Tacoma * * * to any person or corporation whatever, formerly owned by said Tacoma Railway & Motor Company (one of the consolidated companies) * * * also, any and all other franchises, rights and privileges which may be granted hereafter, by said City of Tacoma * * * either to the original grantee or grantee named in either of the aforesaid ordinances (whether those hereinabove specifically mentioned or any other hereinafter referred to only in general terms), or to said Tacoma Railway & Motor Company as the successor in interest of such original grantee or grantees, in and by any ordinance or ordinances amending, enlarging, extending or otherwise modifying either or any of said existing ordinances."

Upon the part of the City it is contended that the description of the "after acquired property" in the mortgage is not sufficient to cover the franchise and property now in question, and that, therefore, the complainant has no interest sufficient to support its suit.

The foregoing shows an intention to mortgage "after acquired" franchises both particularly and generally and nothing appears in the situation, circumstances or language of the mortgage showing any intent to include only franchises for the operation of street cars.

The following cases have been called to the Court's attention:

Guaranty Trust Co. v. Atl. etc. R. Co., 132 Fed., 68;

Beall v. White, 94 U. S., 382;

Smith v. McCullough, 104 U. S., 25;

Parker v. New Orleans etc. R. Co., 33 Fed., 693;

T. R. & P. Co. v. Tacoma, 79 Wash., 508;

Farmers etc. Co. v. Commercial Bank, 11 Wis., 207;

Dinsmore v. Racine etc. R. Co., 12 Wis., 649;

Farmers etc. Co. v. Cary, 13 Wis., 110; [33]

Farmers etc. Co. v. Commercial Bank, 15 Wis., 424; 82 Am. Dec. 689;

Aldridge v. Pardee, 24 Tex. Civ. App., 254; 60 S. W. 789;

Brainerd v. Peck, 34 Vt., 496;

Meyer v. Johnston, 53 Ala. 237, 331.

The foregoing cases are all clearly distinguishable from the present case.

Whether such language as that used in the mortgage in the present case would suffice as against an innocent purchaser from the mortgagor for value, it is not necessary to determine. In the present case the mortgagor and mortgagee have treated and recognized the mortgage as covering this franchise and the property used under it. As the City could not object to a mortgage being placed upon the franchise after it was granted, it is clear that it is not in a position to question the existence of the lien of the mortgage where the language, at most, is uncertain and ambiguous and the parties to the mortgage have given to it a construction extending the lien over the property in question.

A mortgage of after-acquired property can only attach to such property in the condition in which it comes into the mortgagor's hands.

Jones on Corporate Bonds and Mortgages, Sec. 114.

The following recitals from the decision of the State court show the main question in controversy, consideration of which is asked herein:

> "The respondent, the City of Tacoma, is a city of the first class, and since 1893, has owned and operated a municipal lighting plant. In 1912, it qualified itself to take over the entire lighting business of the city. The appellant owns and operates a street railway system in the City of Tacoma. In 1890, the legislature passed an act (Laws 1890, p. 131) classifying cities, and empowering cities of the first class to frame their own charters. It also empowered them (Rem. & Bal. Code, Sec. 7507, subd. 7; P. C. 77, sec. 83):
>
> "'To lay out, establish, open * * * or otherwise improve streets, alleys, avenues, * * * and to regulate **[34]** and control the use thereof, and to vacate the same, and to authorize or prohibit the use of electricity at, in, or upon any of said streets, or for other purposes, and to prescribe the terms and conditions upon which the same may be so used and to regulate the use thereof.'
>
> "In pursuance of this power, the respondent framed an independent charter, and amended the charter in 1896, prohibiting the legislative

power of the city from granting to any person or corporation a franchise, privilege, or right 'to sell or supply water or electric lights within the City of Tacoma to the city or any of its inhabitants,' as long as the city owns a plant or plants for that purpose and is engaged in the public duty of supplying water or light, subject to the exception that the city might grant a franchise to supply water or electric light to any part of the city not supplied or furnished by the city plant, 'to cease and determine at such time as the City of Tacoma shall furnish and provide water and light in said section or part of the city.' This amendment was carried into the charter of 1909.

"In harmony with the charter, the city council, in 1905, adopted an ordinance granting to the appellant, its successors and assigns, for a period of twenty-five years, 'the right, privilege, authority and franchise,' to erect and maintain poles, lines, and conduits and to stretch wires thereon along, across and underneath the streets and alleys of the city for the purpose of transmitting, distributing, and selling electric current, to be furnished and used for the purpose of furnishing 'power and heat, or either of them,' for power and heating purposes, and 'for lighting street cars,' and providing that it should not 'furnish power to be used for lighting or generating electricity for lighting.' It was provided that the stipulations in the ordinance should not prevent the city from granting

the appellant 'by special permit' the right to furnish electric current 'for lighting purposes,' subject to the provisions of the city charter and the laws of the State, 'such permit, however, to be revocable at any time at the option of the city.' The ordinance further provided:

" 'Section 11. That each and every right, privilege and authority and franchise by this ordinance granted shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the commissioner of public works of said city, under the directions and authority of the city council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the serving of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the [35] conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles,

lines, wires, or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said City of Tacoma.' Ordinance No. 2295.

"Another section of the ordinance provided that the grant was subject to the right of the city at any time, on thirty days' notice to the grantee, to repeal, change or modify the grant, if the franchise granted was not exercised in accordance with the provisions of the ordinance; 'and the city council reserves the right so to do, and this section shall be considered as a cumulative and additional remedy to that provided by section 11 of this ordinance.' Another section of the ordinance, in express terms, reserved to the city the right to maintain and operate an electric light, heat and power plant. The appellant filed an acceptance of the ordinance, as follows:

'And the said Tacoma Railway & Power Company, by its manager and upon due authority of its board of directors, agrees to be bound by the conditions, limitations and obligations set forth and contained in said ordinance.'

"In December, 1908, the appellant entered into a contract with the Northern Pacific Railway Company, wherein it obligated itself to furnish to that company, at its depot in the city

and at its shops in South Tacoma, all the electric power that it uses 'for power purposes and for lighting purposes, for a period of ten years from the date of said contract.' On the second day of April, 1913, the city then being qualified to take over all the lighting business within its boundaries, passed a resolution revoking the permit which it had theretofore granted to the appellant to furnish electric current for lighting purposes, and providing that, from and after April 15 following, it should cease to furnish any current for that purpose. On April 21 following, the council passed a resolution, reciting that the appellant was then supplying electric current to be used directly and indirectly for lighting purposes. The resolution directed the commissioner of public works to notify the appellant that, in case of failure to comply with the terms and conditions of the ordinance before the expiration of thirty days after service of the notice, the city would consider the franchise granted by the ordinance null and void, and would claim a forfeiture of all poles, wires, lines and other property located or constructed in pursuance of the ordinance, unless the same should be removed within sixty days as specified in section 11, and that the council would repeal the ordinance. The notice was served on April 23. The appellant declined to comply with the notice and on the 22d day of May, commenced this action, praying that the appellant be enjoined from repealing the ordinance or de-

claring the same null and void, and praying that it be enjoined from asserting a forfeiture. [36]

"The city answered, setting forth the matters and things to which we have adverted, and praying that the appellant be enjoined from furnishing electric power in the city, to be used directly or indirectly for lighting purposes; and that the ordinance to which reference has been made, 'and every right, privilege, authority, and franchise granted thereby,' be forfeited and declared to be null and void.

"It was adjudged, that all the powers granted by the ordinance had been forfeited by the appellant in continuing to furnish the Northern Pacific Railway Company with power for lighting; that the ordinance should be null and void and of no further effect; that the appellant should be no longer entitled to exercise any privileges under it 'except to remove its poles, lines, wires, and other property from the streets of said city'; that the appellant be enjoined from maintaining poles, lines or stretching or maintaining wires thereon, in, over, upon, or across the streets or alleys of the city, and from transmitting electric current over said lines or wires for the purpose of furnishing 'power or heat,' or for any other purpose arising out of, or dependent upon, such ordinance. It was further adjudged that, unless the appellant shall 'within sixty days after the entry of this decree, remove its poles, wires, and other property from the streets, alleys and public places of the city,

the same shall be thereupon forfeited to and be the property of the City of Tacoma.'

"The appeal presents four principal questions: (1) Was the condition in the ordinance that the appellant should not furnish electricity for lighting purposes a valid one; that is, did the city have the power to so limit the franchise? (2) If so, was the limitation abrogated by the public service commission law (Laws 1911, p. 543)? (3) Did the refusal of the appellant to discontinue furnishing power to the Northern Pacific Railway Company for lighting purposes warrant the Court in adjudging a forfeiture? And (4) Did the Court commit error in excluding certain testimony? These questions will be treated in the order stated." (At pp. 510–514, inc.)

The first two of the four questions mentioned depend upon the construction of State statutes, and the construction given to them by the State court is binding upon this Court. Upon the third question the State court held that the equitable maxim that equity abhors a forfeiture means that, ordinarily, property will not be declared forfeited where the franchise, or coontract, leaves a discretion in the Court, and that such maxim and rule has no application in a case such as the present where the letter of the franchise, itself, makes express provision for such forfeiture. **[37]**

Where the jurisdiction depends on diversity of citizenship, alone, and no constitutional question is involved, as in this case, in the absence of authority

controlling on this Court, where the decision of the State court touches the same property, in consideration of the results should the decisions be conflicting —while not absolutely bound by the ruling of the State court, more than ordinary weight must be given it and its finding followed, unless the Court is fully convinced that it is erroneous. In view of the reasoning of the State court and the analysis made by it of the decisions on this question, its ruling is approved and followed.

The ordinance in question contains the following provisions:

> "Section 1. That there be and is hereby granted to the Tacoma Railway and Power Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, its successors and assigns, for a period of twenty-five (25) years, the right, privilege, authority and franchise to erect and maintain pole lines and underground conduits and to stretch wires thereon and therein, over, along, across and also underneath the streets and alleys of the City of Tacoma in the manner hereinafter provided, for the purpose of transmitting, distributing and selling electric current to be furnished and used for the purpose of furnishing power and heat, or either of them, and the further right to charge for such current a reasonable compensation and for any other use or uses to which electricity may be put, except as hereinafter provided; provided that neither said Tacoma Railway and Power Company, nor

its successors or assigns, shall have any right to supply electric current to be used directly or indirectly for lighting purposes; or to run motors, dynamos or other machines by which electric current shall be generated for lighting purposes, to any person, firm, association or corporation, except, where the grantee herein, its successors and assigns, may furnish current for street railway purposes, then and in that event current may be sold for lighting street cars, but for no other lighting purpose whatever. It is the intention of this section to grant to the Tacoma Railway and Power Company, its successors and assigns, the right to sell power for power and heating purposes, and for lighting street cars; but in no event, except as hereinafter provided, shall the said grantee, its successors or assigns, furnish power to be used for lighting or generating electricity for lighting; provided further, however, that nothing in this section contained shall prevent said city from granting the said Tacoma Railway and Power Company, its successors and assigns, by special permit, the right to furnish any person, firm or corporation within said city [38] or said city, electric current for lighting purposes, subject to the provisions of the City Charter and the laws of the State of Washington; such permit, however, to be revocable at any time at the option of the city. * * *

"Sec. 11. That each and every right, privilege, and authority and franchise by this ordi-

nance granted shall, without the passage of any resolution, ordinance or any action of any kind whatsoever on the part of the City of Tacoma, be null and void and absolutely of no effect, upon the failure of said grantee, its successors or assigns, to perform any and all of the conditions in this ordinance specified and mentioned, for a period of thirty days after notice shall have been served upon said grantee, its successors and assigns, by the Commissioner of Public Works of said city, under the directions and authority of the City Council of said city to the effect that said city will, if said failure is not corrected before the expiration of thirty days from the service of said notice, consider this franchise null and void and absolutely of no effect because of the failure of said grantee, its successors and assigns, to perform any or all of the conditions in this ordinance specified; and in the event of the forfeiture of the franchise hereby granted, on account of the breach of any of the conditions herein, the said grantee, its successors and assigns, shall also forfeit and surrender to the City of Tacoma, all poles, lines, wires or other property that may be located or constructed in pursuance hereof, within the City of Tacoma, unless the same are removed within sixty days thereafter and said streets, alleys and public places from which they are removed put in good condition, and the same shall thereupon become and be the property of said City of Tacoma. * * *

"Sec. 17. This grant is subject to the right of the City Council at any time, on thirty days' written notice to said grantee, its successors and assigns, by the Commissioner of Public Works, authorized so to do, hereafter to repeal, change or modify this grant, if the franchise granted hereby is not operated in accordance with the provisions of this ordinance or at all, and the City Council reserves the right so to do and this section shall be considered as a cumulative and an additional remedy to that provided by section 11 of this ordinance."

Other sections of this ordinance impose upon the grantee of the franchise many affirmative obligations. The only ground of forfeiture authorized is that set forth in paragraph 11: "The failure of said grantee, its successors or assigns, to perform any and all conditions in this ordinance specified and mentioned for a period of thirty days after notice."

It is now contended that this language contemplates only the failure to perform those affirmative duties imposed [39] upon the grantee of the franchise by the terms of the ordinance; that, so far as those things forbidden to be done by the grantee are concerned—as was the right to furnish electricity for lighting purposes—it was not intended that a forfeiture might be enforced, for such a violation; that injunctive relief in such a matter would afford an ample remedy.

It may be conceded that such relief would be more appropriate and more nearly complete—to prevent the grantee's doing acts forbidden to it in the fran-

chise than to compel the performance of those acts undertaken by it; but the language used shows no intent to limit the right of forfeiture as contended. One of the conditions of the franchise was that the grantee should, in no event, without a permit from the City, furnish electric power for lighting. True, the word "perform," considered by itself, is more appropriate to express action than inaction; but when considered in the connection in which it was used:

> "Perform any and all conditions of the ordinance specified and mentioned,"

it is clear that it contemplates both the doing and the not doing of those things required. In such connection it means the carrying out, or the fulfilling of all conditions of the ordinance.

Thirty days are allowed the Tacoma Railway & Power Company under the resolution of the City Council, within which to comply with its requirements and avoid a forfeiture.

During this thirty days, there is evidence of various conversations between the officers of the Tacoma Railway & Power Company and the executive officers of the City and certain correspondence between officers of the company in charge of the matter. Evidence of such conversations was, by the State Supreme Court, held inadmissible, it appearing to that court that they had occurred before the passage of the resolution [40] of April 21st. The evidence in the present case is that a number of these conversations were after the passage of the resolution. This evidence, doubtless, shows that the offi-

cers of the Tacoma Railway & Power Company were not acting in hostile defiance of the requirements of the resolution.

This evidence, also, shows that the City was not prepared at this time to immediately take care of all of the needs of the Northern Pacific Railway Company, being supplied by the Tacoma Railway & Power Company under its contract with that company. It further shows that the officers of the Tacoma Railway & Power Company were acting under the belief that the City's officers, on account of the foregoing fact, would not insist upon a forfeiture pending on adjudication in court of the questions that had arisen between the Tacoma Railway & Power Company and the City, even though the former did continue to furnish electric power, under its contract, to the Northern Pacific Railway Company, of too high a voltage for light, but which was, by the Northern Pacific Railway Company transformed, on its own premises to a lower voltage and used for lighting purposes.

These officers of the Tacoma Railway & Power Company acted in the evident belief that the resolution of April 21st was to be treated as a threat of forfeiture, only as a step deemed—as they understood—by both the officers of the Tacoma Railway & Power Company and the City, to be necessary in order to bring the matter into court for adjudication, and made without any real purpose upon the part of the City, or its officers to actually forfeit the franchise in pursuance of the resolution in case the company failed to comply with the requirements of the

resolution within the thirty days therein provided. [41]

This is as far as the preponderance of the evidence goes. It fails to establish, by the clear and convincing proof necessary, that the officers of the City wrongfully, or intentionally misled the officers of the Tacoma Railway & Power Company in this regard. Nor is there a clear preponderance showing acts or statements by the officers of the City of such a nature as to warrant the officers of the defendant company in assuming that the resolution declaring a forfeiture under the terms therein specified, would be disregarded.

This conclusion renders it unnecessary to consider what, if any, effect representations, or concessions on the part of the executive officers of the City, or officers acting in their executive capacity, would have towards modifying such a resolution of the City Council.

Particular significance is not to be attached to the fact that the Tacoma Railway & Power Company had contracted with the Northern Pacific Railway Company for the period of ten years, to furnish the latter company with electric power for lighting purposes, as showing a willingness to violate the provisions of its franchise for, at the time of making this contract, the former company had a permit from the City for this purpose. Though this permit was revocable at any time, the Tacoma Railway & Power Company had no notice that its revocation was definitely contemplated and, in its contract with the Northern Pacific Railway Company, provision was

made for the eventuality of the revocation by the City of this permission.

After the City answered in the State court and by cross-complaint prayed the forfeiture of the franchise, and pending the trial of that cause, the City and Tacoma Railway & Power Company entered into an agreement by the terms of which the latter was to continue supplying the Northern Pacific Railway Company electric current for lighting purposes, but it was [42] stipulated that the forfeiture claimed by the City on account of the acts complained of in the cross-complaint should be unaffected by this subsequent agreement. While this tends to show the City unprepared to handle the needs of the Northern Pacific Railway Company at the time of the claimed forfeiture, it is not sufficient to deprive the City of its right of forfeiture provided for in the franchise.

The prayer of the complaint is denied. [43]

Order for Temporary Injunction.

This cause coming on for hearing on the motion of the Old Colony Trust Company, plaintiff herein, for a temporary injunction, the said plaintiff appearing by James B. Howe, its attorney, and the defendant, City of Tacoma, appearing by T. L. Stiles, its attorney, and the Court being fully advised,—

IT IS ORDERED that the defendant, City of Tacoma, be and it hereby is restrained and enjoined during the pendency of this action and until the further order of this Court, from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance #2295 of the City of Ta-

coma, has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance, in the City of Tacoma, and from asserting any right, title, or interest in said poles, wires and lines, by reason of any forfeiture of such franchise, and from taking any steps whatever to interfere with said poles, wires and lines or any of them, and this order is not intended to authorize and does not authorize the furnishing directly or indirectly of electricity for lighting purposes within the City of Tacoma, under the authority of said Ordinance #2295, or the use of the property constructed under said ordinance for the furnishing of electricity directly or indirectly for lighting uses within the City of Tacoma.

IT IS FURTHER ORDERED that a temporary writ of injunction in accordance with the provisions of this order issue upon the filing with and approval by the clerk of this court of a bond in the penal sum of $2500.00, conditioned to pay all damages and costs which may accrue to the City of Tacoma by reason [44] of the granting of the temporary injunction herein authorized.

EDWARD E. CUSHMAN,
Judge.

Done in open court this 23d day of December.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Dec. 23, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [45]

Temporary Injunction Bond.

KNOW ALL MEN BY THESE PRESENTS: That the Old Colony Trust Company, a corporation, as principal, and United States Fidelity & Guaranty Co., a corporation, as surety, and their successors and assigns, are held and firmly bound to pay to the City of Tacoma, a municipal corporation, the sum of $2500.00, in lawful money of the United States of America.

In the above-entitled action on the application of the Old Colony Trust Company, an order has been entered on this 23d day of December, 1914, directing the issuance of a temporary injunction against the City of Tacoma, and the condition of this obligation is such that if said principal and surety herein shall pay to the said City of Tacoma, all costs and damages which may accrue to the City of Tacoma by reason of the granting of said temporary injunction, then this obligation shall be void, otherwise to remain in full force and effect.

Dated Dec. 24, 1914, Tacoma, Wash.

[Seal] OLD COLONY TRUST COMPANY,
By JAMES B. HOWE,
Its Solicitor, Principal.

UNITED STATES FIDELITY & GUARANTY CO.,
By HARRY C. MILLER,
Attorney in Fact,
Surety.

Approved: Dec. 24, 1914.

FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Dec. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [46]

Temporary Writ of Injunction.

United States of America,
Western District of Washington,
Southern Division,—ss.

The President of the United States of America to the City of Tacoma, Municipal Corporation:

WHEREAS, Old Colony Trust Company, a corporation, plaintiff in the above-entitled action, a citizen of the State of Massachusetts, has filed on the chancery side of the District Court of the United States, for the Western District of Washington, Southern Division, a bill against the above-named defendant, and has obtained an allowance of a temporary injunction as prayed for in said Bill.

NOW, THEREFORE, we, having regard to the matters in said Bill contained, do hereby command and strictly enjoin you, the said City of Tacoma, during the pendency of this action and until the further order of said District Court, from asserting that the franchise granted to the Tacoma Railway & Power Company by Ordinance #2295 of the City of Tacoma, has been forfeited, and from in any manner interfering with the poles, wires and lines constructed under said ordinance, in the City of Tacoma, and from asserting any right, title or interest in said poles, wires and lines, by reason of any forfeiture of such franchise, and from taking any steps whatever

to interfere with said poles, wires and lines or any of them, all of which commands and injunctions you are required to observe and obey until said District Court shall make further order in the premises.

Hereof fail not, under penalty of the law thence ensuing. [47]

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 24th day of December, 1914, and in the 139 year of the Independence of the United States of America.

[Seal] FRANK L. CROSBY,
Clerk.
By F. M. Harshberger,
Deputy.

Return on Service of Writ.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed Temporary Writ of Injunction on the therein named City of Tacoma by handing to and leaving a true and correct copy thereof with A. V. Fawcett, Mayor of the City of Tacoma, Washington, personally, at Tacoma, Washington, in said District, on the 24th day of December, A. D. 1914.

JOHN M. BOYLE,
U. S. Marshal.
By John T. Secrist,
Deputy.

Marshal's fees—$2.00.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division.

Dec. 24, 1914. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [48]

Statement of the Evidence.

This cause came on for hearing on the 6th and 7th days of January, 1915, before the Honorable E. E. Cushman, Judge. James B. Howe, and John A. Shackleford, appeared for the plaintiff and T. L. Stiles, for the defendant.

The plaintiff offered in evidence a copy of the mortgage made by the Tacoma Railway & Power Company to the plaintiff. Certification of the copy having been waived. The copy was admitted in evidence and marked Exhibit "I."

[Testimony of L. H. Bean, for Plaintiff.]

L. H. BEAN, was sworn as a witness and testified that he had been manager of the Tacoma Railway & Power Company for four years and ten months, and that he was familiar with the lines, poles, wires and franchises in controversy, in the suit. That the revenue from the operation of the poles, wires and franchises had been used for the payment of operating expenses and payment of interest on bonds secured by the mortgage to the plaintiff. He stated that the Tacoma Railway & Power Company had been for some years supplying electricity to the Northern Pacific,—that the City of Tacoma claimed that the Northern Pacific Railway Company was [49] using a portion of that power for lighting, and that the City claimed that the only authority under which electricity ultimately used for lighting purposes could be supplied was under a revocable per-

(Testimony of L. H. Bean.)

mit, and that on April 2d, 1913, the City passed a resolution revoking the permit to the Tacoma Railway & Power Company to sell power which would in turn be used in whole or in part for lighting purposes.

Mr. Bean was asked this question: Q. Now, at what voltage was the Company furnishing power to the Northern Pacific?

Judge Stiles objected to the question as not relevant or material. The objection was overruled and a recess was taken to enable the attorneys to agree upon a stipulation as to the part of the facts in the case. When the Court reconvened Mr. Bean testified as follows:

"Well, the resolution revoking the permit was passed on the second day of April, 1913, and the next morning I called on the Commissioner of Light and Water and told him that while we did not feel that the Company was obligated legally to give up the business, we did not want to take any chance whatsoever in connection with our franchise and we were prepared at that time to turn the total business of the Northern Pacific Railway Company over to him if he was prepared to take it over. I called his attention to the fact that I had had estimates made of the probable cost of the city taking the business over, which was about $8,000.00. I also told him that in view of the fact that it was not absolutely certain in my opinion that *that* the City could retain the business, there might be some loss to the City in the event **[50]** they did not eventually keep it. He said he

(Testimony of L. H. Bean.)

wanted to think the matter over as to whether I,—whether we should continue to supply the Northern Pacific, and that he would talk to me again about it. I called on him, I believe it was the next day, and had another talk with him and he said that the City wanted the Tacoma Railway & Power Company to continue to supply the Northern Pacific Railway Company. I told him that we could not afford to do this unless the necessary steps were taken to protect our franchise in the matter and that I would write him a letter setting forth the company's position and willingness to continue to supply the current, providing the necessary steps were taken to protect us. That was on the 4th day of April, that I wrote a letter and took it to the Commissioner of Light and Water, and he said that he thought that it was all right, and I suggested that we go and talk to the City Attorney about it."

Judge Stiles objected to the statement of the witness on the ground that it was inadmissible, irrelevant and immaterial and incompetent to charge the City. The objection was overruled.

A letter marked Exhibit 11 was called to the attention of Mr. Bean, and Judge Stiles said: "This is one of the letters to which I object. There is a bunch of them. They are letters back and forth between Mr. Bean and Mr. Howe, and someone else, because they are merely communications between individuals representing the plaintiff and the other side." The objection was overruled and Mr. Stiles stated: "I wish to have it understoood here that I may take an exception and have it allowed without

(Testimony of L. H. Bean.)

announcing it." [51] The Court said: "It will be understood that you will reserve your exceptions where you object."

The witness continued: "This is a letter dated Apr. 16th, to Mr. James B. Howe, and was written inclosing a copy of a letter which had been drawn up with reference to continuing the furnishing the Northern Pacific Railway with electric current pending the adjustment of the matter through the court and was written after I had a talk with the City Attorney, in which he had suggested that the best thing was for the City to bring an injunction suit,—to prevent the Company from furnishing the current as it was furnishing it to the Northern Pacific Railway Company.

The next lettter was from Mr. Howe under date of April 17th, returning the draft of the letter which I had sent him of date of April 16th, and on receipt of that on April 18th, I acknowledged the receipt of it and wrote to the Commissioner of Light and Water again under that date. A copy of which letter is set forth in the stipulation, and as under date of April 18th. That letter was taken to the Commissioner and talked over with the Commissioner and with Judge Stiles, and Judge Stiles stated that he had been considering the matter and he had come to the conclusion that it was not proper for the City to bring an injunction suit in the matter, as it was guided by this ordinance, and if they should bring suit of that character the Court would not recognize it, feeling that the City should be guided by its own ordinances. I might state that he suggested at that time that the proper thing to do was for the com-

(Testimony of L. H. Bean.)

pany to bring the action, which changed the plan, and accordingly I wrote a letter [52] under date of April 21st to Mr. Howe, the letter which I have referred to before. I inclosed a copy of the resolution which Judge Stiles stated would be introduced that day, and which I understood was being introduced for the purpose of giving the Company some basis of bringing an action, which was in the nature of a threat, and would give the Company a basis for bringing an action to prevent them carrying out the resolution.

Judge Shackleford and I called on Judge Stiles and talked the matter over with him and it was at that time that he stated that it was not proper for the City to bring suit. I talked with the City officials a number of times after April 24th. I talked with them all up until the latter part of the month, and I wrote a letter the 30th of April, outlining the Company's position and delivered it in person to the Commissioner of Light and Water. The letter is Exhibit No. 10. The next step that was taken was by bringing action against the City to prevent enforcement of this resolution. Mr. Howe wrote to me on May 5th that he had received my letter, and that he did not think that the change of program materially affected the situation. That is Exhibit No. 16. I had a number of talks with the City officials, always indicating to them our desire to act properly in the matter and not to continue the business unless they would agree to,—if it would not jeopardize the Company's franchise in the matter and I was assured by them that there was no intention on the part of the

(Testimony of L. H. Bean.)

city to endanger the Company's franchise whatever, and after our bringing action, the next I knew of it was somewhere about the 23d day of May, when I received the City's answer and cross-complaint. Prior to that [52½] I had no knowledge or notice, that the City intended to insist on a forfeiture of the franchise. That answer was served on the 23d day of May. The suit by the Company was on the 22d day of May. Immediately after the receipt of the answer and cross-complaint, the matter was taken up again vigorously with the City in an effort to have them take over the business if they possibly could, because we did not want to continue to supply, if there was any danger at all, because I had been reiterating to them time and again, and following out these negotiations on June the 2d, the City passed a resolution authorizing the Commissioner of Light and Water to enter into a contract with the Company for the continuation of the supply of current to the Northern Pacific, and in accordance with this resolution, the City at that time, not being prepared to actually take over the business, as it had been offered to them, entered into a contract on June 4th, through its commercial agent, for the Tacoma Railway and Power Company to continue to supply the Northern Pacific Railway Company. I wrote two letters to Mr. A. L. Thorn under that date. On June 4th I wrote a letter marked Exhibit No. 7, to the commercial manager of the light and water department of the City of Tacoma referring to the contracts entered into between the City of Tacoma and

(Testimony of L. H. Bean.)

the Tacoma Railway and Power Company covering the purchase by the Tacoma Railway & Power Company of an equivalent of the amount of electricity as is sold to the Northern Pacific Railway Company. This letter was with reference to the City not being prepared to furnish the power. At the time that was entered into I offered to turn over the business, all of the business to the City. [53] And I offered at any time to pay the City what the Company received from that business. In accordance with our contract, we have paid to the City the full amount of money due it, pursuant to this contract. The stipulation that was in the other case was entered into by Judge Shackleford and Judge Stiles. The Company carried out the contract in every particular. The effect on the business of the Company if the City took possession of the poles and wires in controversy would be that the Company would necessarily lose the business that is furnished by maintaining the poles and wires. It would affect the business of the Company materially. The forfeiture of the franchise would affect the mortgagee materially, and it would reduce the amount of income, materially. I should judge it would be in the neighborhood of twenty-five or thirty thousand dollars a year. The removal of the poles or the taking of those poles and wires by the City would materially interfere with the power system of the Company. It is almost impossible to calculate the amount of real damage which would ensue, because it would necessitate a rearrangement of most of the power system in order to properly carry out the business of the Company.

(Testimony of L. H. Bean.)

And that condition, would continue as long as the term of the franchise. I mean if we lost the business and did not lose the franchise. The value of those poles and wires is more than $3,000.00.

Mr. Bean testified on cross-examination that the Tacoma Railway & Power Company was in business before the mortgage dated in 1899. That he was not familiar with the original organization and was not here when the franchise under Ordinance #2295 was granted. That prior to [54] the granting of that franchise the Company was in the street railway business, and if the franchise were taken away that it would have left the street railway business. That the actual value of the property of the Tacoma Railway & Power Company is in excess of six million dollars, including some property outside of the City. The property outside of the City referred to is a line from the City limits to the Town of Steilacoom, about five and one-half or six miles. The portion of the Spanaway line, outside of the City limits, approximately six miles, worth approximately at least, $5000.00 per mile, and that the Company does not own other street railway property outside of the City in addition to the two lines mentioned. The witness also stated that he is not familiar with the market value of the property covered by the Old Colony Trust Company mortgage, which includes the total property of the Tacoma Railway & Power Company. That his statement as to the value of the property of the Company being at least six or seven million dollars referred to the estimated physical valuation of

(Testimony of L. H. Bean.)

the property or the replacement cost. That the Company at the present time is not earning more than enough to pay operating expenses, taxes and interest on its bonds and floating indebtedness. That the Company has a large floating debt, on which it pays interest. That the contract that the City made during the litigation was one to purchase a certain amount of current at certain load factor which made the amount equal, the witness thought, to about $860.00 per month. That $860.00 per month was the amount paid the City for current equivalent in amount to the current which the Company was selling to the Northern Pacific. That the Company had other power [55] customers than the Northern Pacific. That the Company did not as a regular thing manufacture electricity to sell, but purchased electricity from another Company. That the contract is based upon maximum lode and for this reason the kilowatt hour price would fluctuate. That the cost for power has been about .575 per kilowatt hour.

The witness stated he would have to refer to the books to find out the gross amount of cost. He said he could not tell what the profit per annum of the power business was. He stated that he was manager of the Tacoma Division of the Puget Sound Traction Light & Power Company. That Mr. Shackleford was Attorney for the Tacoma Railway & Power Company and President of that Company, and that Mr. James B. Howe is General Counsel for the Puget Sound Traction Light & Power Company, and the

(Testimony of L. H. Bean.)

Tacoma Railway & Power Company. That he verified the complaint in the suit commenced in this court on August 17th, to enjoin the City of Tacoma from taking possession of certain poles and wires, which suit was brought by the Puget Sound Traction Light & Power Company, and that the statement contained in paragraph nine of said complaint was true, that on "June 11th, the Tacoma Railway and Power Company sold and transferred to the Puget Sound Traction, Light & Power Company, such of the poles and wires of the Tacoma Railway & Power Company as had been theretofore used by said Tacoma Railway & Power Company, in the City of Tacoma, in the distribution of electricity for power purposes under Ordinance #2295." And witness took part in that sale and transfer, that he had it up with Mr. Leonard, General Manager of the Puget Sound Traction Light & Power Company, and took it up with Mr. Howe, and the plan of sale was arranged [56] with those gentlemen. That the property was sold subject to the Old Colony Trust Company mortgage, and the consent of the Old Colony Trust Company to the transfer was not procured, and that no release was procured in accordance with the provisions of the tenth article of the mortgage. That there were no other customers than the Northern Pacific which had been directly or indirectly using current for lighting purposes.

"Q. Now, on the second of April, were you at the City Hall when the resolution of the second of April was passed?

(Testimony of L. H. Bean.)

A. I was not in the council room at the time it was passed.

Q. How soon afterward did you know that it was passed? A. That afternoon.

Q. In fact, a copy of it was furnished to you.

A. I received a copy of it the same afternoon, I think.

Q. What was there about that resolution which stirred you up to be in fear that you might lose your franchise?

A. Well, it was not exactly that resolution. It was the fact that the City of Tacoma claimed that we could not under our franchise, sell a person power and could devote that power to any use that we desired and I felt that we could sell power and that a person could, in turn, use it for any purpose, and I did not want to take any chances whatsoever with any legal questions as to the franchise. That came to my mind, that I could not take any chances with it and I immediately opened negotiations with the City to see if they would give us authority to continue until we could test the thing out in court to see what rights we had under the franchise.

Q. The resolution merely required you to stop furnishing electric current to be used directly or indirectly for lighting purposes?

A. Shall I go ahead and explain that? [57]

Q. Take that resolution and point out to me what there was in it that should give you any qualms about that franchise.

A. Nothing particularly in it except this: We had

(Testimony of L. H. Bean.)

a contract with the Northern Pacific Railway Company, to furnish a certain amount of power. Its premises were so wired for the use of this power for light and power that they could not be separated, and I felt that the Company had to live up to its contract with the Northern Pacific Railway Company under all circumstances, and in order to do that, it was necessary not to do anything contrary to its franchise rights.

Q. The City officials did not know anything about that situation, did they? A. They certainly did.

Q. Did they know anything about the contract with the Northern Pacific until after that case was tried on the sixth of June? A. Yes, sir.

Q. Who knew?

A. I told Mr. Lawson and his assistant and you, sir.

Q. Of the contents of that contract?

A. I did not say that I told you about the contents of that contract, but I most assuredly told you that we had a contract with the Northern Pacific Railway Company—(interrupted).

Q. But that I am not questioning you about. I say, did you ever make known to any of us that you had a contract with the Northern Pacific Railway Company running for ten years and which bound you to furnish current to the Northern Pacific Railway Company for light and power and bound it to take all of its light and power current from you?

A. Did I make known the actual contents of that contract? [58]

(Testimony of L. H. Bean.)

Q. Yes. A. I do not know as I did.

Q. When was it you say you first came to the City Hall and had a talk with reference to that resolution? A. The day after the resolution passed.

Q. On the third? A. Yes, sir.

Q. Then you came and talked to me?

A. I do not think that I came and talked to you on the same day, but it was the day following.

Q. Now, what did you say?

"I said the Tacoma Railway & Power Company was willing and ready to turn over to the City the entire Northern Pacific Railway Company business, or any part thereof, and I explained the situation, the conditions of the wiring of the different buildings of the Northern Pacific to the City, and I asked them if they were prepared to take it over. That was on April 3d. The Commissioners of Light and Water said he would have to look into the matter to see what condition they were in, and that he would talk to me about it again. The next day, the 4th day of April, I went to see him again and he said that the City was not prepared to take over the business of the Northern Pacific and he wished the Tacoma Railway & Power Company would continue to supply them, and that he would protect us in any way that was necessary, and he suggested that I should write him a letter and have his consent and the consent of the Commissioner of Public Works to the continuation of the supply."

The witness stated he did not go to the City Council because he first wanted to straighten out the de-

(Testimony of L. H. Bean.)

tails with the [59] Commissioner of Light and Water, and get it legally right before he went to the Council. That his idea was to get an agreement for the Tacoma Railway & Power Company to continue to supply the Northern Pacific with power until the controversy with the City was settled, and that he explained his purpose very frankly. That he felt if he went to the Council first that the matter would be referred to the City Attorney and it would be necessary to retrace his steps and go over it again, that the reason the letter dated April 18th was not written earlier was that a letter had been prepared and shown to Judge Stiles and that Judge Stiles had said the letter was all right, and the witness was attempting to get it signed. That Judge Stiles said there was no reason for apprehension, and that the City had no intention of doing anything to void the franchise, and that the City Attorney had said it was a matter of form and that it was all right for us to continue to supply the Northern Pacific and that witness kept insisting on a letter so the records in the matter would be clear.

Q. That is the reason you wrote this letter of the 18th? A. Yes, sir, absolutely.

Q. And you endeavored to get Mr. Lawson and Mr. Woods to sign it? A. Yes, sir.

Q. Isn't it a fact that I would not let them sign it?

A. You never said to me absolutely. You said it was all right, but I know you would not give your consent.

(Testimony of L. H. Bean.)

Q. Do you know that this letter was ever brought to them by me?

A. Not as I know of, not that letter.

Q. Now, will you state to the Court what you considered to be the point in that letter? [60]

A. Yes, sir.

Q. Explain why you should write a letter suggesting that you were willing to do a thing which you were already bound to do, if you had any right.

The witness further stated: "The Tacoma Railway & Power Company had a contract with the Northern Pacific for the supplying of electric power, and a portion of that power we understood had been used for lighting. The City claimed we had no right to furnish this power which was in turn converted by the Northern Pacific into use for lighting. I felt that that was not the proper position for the City to take. However, we felt that we did not want to jeopardize our property or franchise rights and wanted to take whatever precaution was necessary to protect ourselves, and at the same time we did not want to lose the business unless it was necessary. But we were willing to give the business to the City, or pay them an equivalent amount, or buy the same amount of power until the matter was adjudicated through the courts. It was for the purpose of preserving the record and protecting ourselves and taking absolutely no chances with our franchise, that I, as you say, haunted the City Hall and endeavored to get a written agreement with some of the City officials, and they had assured me that there was no

(Testimony of L. H. Bean.)

intention on the part of the City doing anything of that kind."

Q. Up to that time had you ever suggested to anybody that there was wrapped up in this proposition the possible forfeiture of your franchise?

A. I had to you.

Q. Before the 18th?

A. Before that time, yes, sir. [61]

Q. To what effect?

A. You pooh-poohed the idea and said it was absolutely not the intention of the City to void the City's franchise.

Q. Now, Mr. Bean, having these oral assurances, both from the Commissioner of Light and Water and from me, why did you think it necessary to put it into writing and have those two men sign it?

A. Because I believe in putting everything of that kind in writing.

Q. Why did you not say something about a waiver of any claim to forfeiture of the franchise in this letter?

A. Because I drew up this letter for the purpose of submitting it to our counsel, and it was approved, and I supposed the Company was properly protected in the matter.

Q. Well, now, on the 21st of April, up to that time, you had not ceased furnishing power which was used for lighting purposes had you? A. No, sir.

Q. On the 21st of April, the Council passed another resolution? A. Yes, sir.

Q. You received a copy of that resolution on the

(Testimony of L. H. Bean.)

23d of April, did you not?

A. About that time, yes, sir.

Q. Now, that resolution, after reciting the passage of Ordinance No. 2295, and reciting that contrary to the terms of the ordinance, and the recall of the permit, your Company was continuing to furnish power for lighting purposes, contained this: "Now, therefore, be it resolved by the City Council, of the City of Tacoma, that for the said violation [62] of said franchise, it is the intention of the Council of said City to repeal said Ordinance No. 2295, and revoke the privileges granted thereby, unless said violations shall cease within thirty days after the giving notice hereinafter provided for," with a further provision in regard to the forfeiture of the poles, wires, etc.

Q. Now, when you received that, didn't it give you some idea that this was in earnest?

"You gave me a copy of that resolution I believe on the 21st of April, and I sent it to Mr. Howe, and I believed that that resolution was being introduced for the purpose of giving the Company some basis for an action to test out its rights in the matter, as previous to that time you and I and Judge Shackleford talked the matter over, and you told me you did not believe it was proper for the City to bring an action against the Company, and I supposed that this was to give the Company some basis for bringing an action against the City, and we proceeded from that time on on that theory." It was at my procurement resolution 6161 was passed. [63]

[Testimony of John A. Shackleford, for Plaintiff.]

JOHN A. SHACKLEFORD was sworn and testified that he had lived in Tacoma for twenty-five years, and was a lawyer, and had been City Attorney of Tacoma, and one of the Judges of the Superior Court of Tacoma, and that he is attorney for the Tacoma Railway & Power Company, and President of that Company, and one of the attorneys for the Puget Sound Traction Light & Power Company and the Puget Sound Electric Railway. The witness was asked to state what he had to do with Judge Stiles and Mr. Bean in reference to the franchise which was the subject of controversy. Mr. Stiles objected to the question on the ground that the question was immaterial and irrelevant. The objection was overruled and the witness testified as follows:

"I had several talks with Judge Stiles after the passage of the first resolution, the resolution revoking the permits to furnish light which had been granted, or were supposed to have been granted to the Tacoma Railway & Power Company. Some of those conversations were before the resolution of April 21st, was passed. The first talk that I remember having I talked with Judge Stiles about what method should be pursued with reference to determining the right of the Tacoma Railway & Power Company to furnish electricity to the Northern Pacific, part of which electricity was used by the Railway Company for lighting purposes. In the course of that talk, I remember I made the sugges-

(Testimony of John A. Shackleford.)

tion that it might not be possible for the Company to bring an injunction suit to enjoin the passage of an ordinance forfeiting the franchise. I told Judge Stiles that we were anxious not to endanger the franchise in any way, but we wanted to make some kind of an arrangement about the suit so that the rights [64] of the parties could be determined, and the talk then followed along the line of the City bringing a suit to enjoin the Tacoma Railway & Power Company from furnishing electricity to a customer, in this instance, The Northern Pacific Railway Company, which customer used the electricity for lighting purposes. I cannot remember exactly what was said at the conversation, but I remember very well that at that time the idea of both myself and Judge Stiles, as expressed in the conversation, was along the line of the City bringing an action. After the second resolution was passed, which contained a threat of forfeiture, I had a talk with Judge Stiles, and I think that Mr. Bean was present at the time. I remember saying to Judge Stiles at that time that I supposed that if the City wanted to put the Tacoma Railway & Power Company out of the power business, that it could probably find some way in which to do so, but it seemed to me a very ill-advised course to pursue, especially in view of the fact that the supply of electricity from the City's own plant was comparatively small. Judge Stiles, at that time, said that it was not the intention of the City, that he was sure that the City had no idea of putting us out of business; that they

(Testimony of John A. Shackleford.)

wanted to get the lighting business and protect the lighting business. A day or two before the suit was brought in the State Court by the Tacoma Railway & Power Company, Mr. Bean and I went into Judge Stiles' office together in regard to getting some written statement in regard to the course to be pursued while the suit was pending, with reference to the way the Northern Pacific should be supplied. One of the letters written by Mr. Bean to Mr. Lawson,—I do not recall at this time which one it was,—but it was one of the letters that was called to [65] Judge Stiles' attention. Judge Stiles then said that he would not agree to the signing of that letter. Mr. Bean said to him: 'Well, when this letter was brought in by Mr. Lawsen and myself you said it was all right.' Judge Stiles said: 'Yes, it is all right, it is a statement made by you there; it is all right in a way, but I won't consent to signing it because it seems to me that if it was signed it would be a complete defense to any objection that the City might make to the furnishing of power to the Northern Pacific.' I cannot quote his exact words, but that is the substance of his statement at that time. He complained that the understanding had been in existence for some little while that the Company was to bring suit and that we were delaying about bringing it, and said that if we did not bring one pretty soon that he would start something. The next day I started the suit, but before I started the suit, I had that conference with Judge Stiles, and I spoke to him about a temporary injunction in the case which

(Testimony of John A. Shackleford.)

the Company was about to bring and I asked him about fixing the time when we could take up the matter of a temporary injunction. I had not made any application for a restraining order, because I felt it would be better to have some notice in the matter; that the Company would be better satisfied to have notice given and have a temporary injunction instead of an *ex parte* restraining order. Judge Stiles said it was not his intention to object to an injunction during the suit and that if I would send the papers down to him when they were prepared that he thought we could get the temporary injunction order entered without any hearing. The complaint in the suit was prepared and I think it was filed on the 21st day of May, 1913, and I believe service was not had on the Mayor until the next day. [66] In addition to serving the Mayor, as I remember it, I sent down a copy to Judge Stiles. The next day Judge Stiles sent in his answer and cross-complaint, in which he prayed for a forfeiture of the franchise, among other things, and sent me word that he was not willing to consent to a temporary injunction but wanted to insist upon a trial of the case before Judge Easterday, within the next few days. I made no objection to the early trial of the case, and the case was tried a few days afterward before Judge Easterday. Up to the time of the receipt of Judge Stiles' cross-complaint, praying for a forfeiture of the franchise, and his refusal to consent to a temporary injunction during the meantime, I had not supposed and had not believed that the

(Testimony of John A. Shackleford.)

City intended to insist upon a forfeiture, although the resolution passed on the 21st day of April was a resolution giving notice that forfeiture would be claimed. I thought from the statement of Judge Stiles that it was not the desire of the City to put the Company out of the power business, and from other reports that I received from officers at the City Hall that it was not the intention to insist upon any forfeiture, but Judge Stiles' answer claiming the forfeiture came one day after the 30th day period was up in which we could have cut off the Northern Pacific. As soon as we received that, we went at the matter again to make some arrangements with the City which would prevent any further furnishing to the Northern Pacific Railway Company from being considered as a ground of forfeiture, and on the 2d day of June an understanding was reached in regard to that, which was put into effect by a resolution passed on the 4th day of June, and a stipulation was entered into, which is in evidence here and filed in the case, and the resolution passed is also in evidence. [67] Judge Stiles at that time insisted on keeping the period up until the 2d day of June, out from under the stipulation, although offer was made by the Company to pay an equivalent for current furnished to the Northern Pacific during that period on the same basis as during the period after that. Now, I do not want to be misunderstood as charging Judge Stiles with any intent or purpose to perpetrate any fraud on me or on the Company. I don't want to be in the position of contending that

(Testimony of John A. Shackleford.)

he artfully set up scheme by which we would be lulled into security in the matter and that he took advantage of us. In fact, I do not believe that, but the situation is this: When the matter started out, the understanding all around was that the matter of whether the Company had a right to furnish current to a customer who used a portion of it for lighting, would be fought out without putting the Company out of business as it was sometimes expressed, or without any forfeiture of the franchise. When the change of front came on the part of the City about the matter, they can tell better than I can, but up until the expiration of the 30 day period after the service of this last resolution, it was our understanding that it was not the purpose or intent of the City to put the Company out of the power business. Now, whether it was just a misunderstanding between us or not,—I know that as far as I am concerned that that is the way that I understood it."

The witness on cross-examination was asked: "Did you in your reply make any offer to abate the furnishing of current for lighting purposes?"

The answer was: [68] "I would rather see the reply, but I do not think we did, I am quite confident that we did not because I felt that we had a question which was one of doubt, and a question that should be determined by the proper tribunal, and that was the question whether the customer who buys current has the right to use it for any purpose that he sees fit,—there was another question also whether the passage of the Public Service Law by the

(Testimony of John A. Shackleford.)

State Legislature, had not modified the franchise so as to make it our duty to furnish a customer with electricity when we could reasonably do so and when he demanded it, no matter what use he proposed to make of it. In other words, I believed it was a case where we ought to have an opportunity not to be hung first, but have a trial beforehand.

The witness further stated that he thought the City wanted to see the matter tried out and a decision procured as to the rights of the parties.

After a recess a stipulation between the parties as to certain facts was admitted in evidence and marked Plaintiff's Exhibit "I–A." Plaintiff rested.

[Testimony of Nicholas Lawson, for Defendant.]

Upon the part of the defendant, NICHOLAS LAWSON was sworn and testified that in April, May and June, 1913, he was Commissioner of Light and Water of the City of Tacoma, and as such Commissioner had charge of the electric business of the City, which consisted of selling current for light and power. The witness stated that the City of Tacoma has a plant for the generation of electricity with machinery installed for the generation of thirty-two thousand horse-power, that the city plant generates alternating current. That the current generated was more than sufficient to provide for the requirements of the City. [69]

The witness stated that the Tacoma Railway & Power Company was furnishing current for lighting, that they had no franchise for and that the City sent the City electrician out to check up what the Com-

(Testimony of Nicholas Lawson.)

pany was doing in the City. The electrician made a report, a copy of which was admitted in evidence and marked Defendant's Exhibit "A." The witness received several calls from Mr. Bean after the passage of the resolution of April 2d.

In answer to the question, "What did he want?" the witness said: "I told him it was a legal question; that I had nothing to do about that, and that he had better go to see Judge Stiles, and we went in there to see you, and you said the same thing, that it was a thing that had to be threshed out by the courts. It was not for me to say. I had no power to give any concessions one way or the other."

The witness further testified:

"Q. Did you have any further interviews? Did you say anything to Mr. Bean to the effect that you were willing that they should go in without any danger to a forfeiture of their franchise while this was being threshed out in the courts?

A. No, sir. I told him it was a legal question. I stood on that all the time, that I had nothing to do with it.

Q. Did you receive these various letters which are in evidence here as exhibits? For instance there is one of April 18th, which has a blank at the bottom for a signature. Did you receive that? A. Yes, sir.

Q. Did you get any instructions from me as to the signing of these letters? A. Yes, sir. [70]

Q. To what effect?

A. You said to not have anything to do with them.

Q. Now, here is another one on April 30th. How

(Testimony of Nicholas Lawson.)

about that one, Mr. Lawson?

A. Yes, I remember that one too.

Q. Well, did you sign that?

A. No, sir. I did not sign any of them.

Q. Nor did you at any time make any agreement of any kind with Mr. Bean in regard to that matter?

A. I did not.

Q. Did you give him any intimation that the City might commence a suit or would waive anything while this Company was maintaining a suit?

A. I did not, because I had nothing to do with the suit.

Q. You regarded that as entirely in the hands of the legal department after it was started?

A. Yes, sir.

Q. Do you remember an occasion when Judge Shackleford was there? A. Yes, sir.

Q. Now, what happened then, Mr. Lawson?

A. Well, you and he were talking about it. I remember that much; I had really nothing to say in the matter. It was just simply in your office.

Q. Do you remember whether there was some talk about who should bring suit to thresh out this matter? A. Yes, sir.

Q. What did Mr. Shackleford want?

A. He wanted the City Attorney,—he wanted the City to bring suit. [71]

Q. Do you remember what I told him?

A. Yes, sir.

Q. What was it?

A. That the Company would have to bring the suit.

(Testimony of Nicholas Lawson.)

Q. Do you remember anything like this; that the City of Tacoma had no suit to bring and that if any suit was brought at all it would have to be brought by the Tacoma Railway & Power Company?

A. Yes, sir, I remember that.

Q. Say from the 3d day of April to the 20th day of May, how frequently would you say that Mr. Bean called upon you and interviewed you in regard to this business?

A. Oh, he was in there several times, I could not just recall just how many times.

Q. Did he call on the Council when it was in session?

A. I think he was in the Council once or twice.

Q. On that same business?

A. No, I do not know whether he was in there on that business or not, but that was brought up there, I think."

On cross-examination the witness stated that the City plant generated three-phase alternating current; that the motors used by the Northern Pacific were two-phase motors. That in order to run three two-phase motors with three-phase current it would be necessary to transform the current. That the City did not have transformers to take over two-phase motors of the Northern Pacific and had not procured the transformers at the time witness retired from office on May 7th, 1914. The witness stated that he did have a good deal of talk with Mr. Bean and that he and Mr. Bean always had been friendly and that they talked back and forth about [72]

(Testimony of Nicholas Lawson.)

the matter, but that the witness never promised anything. That he and Mr. Bean went to Judge Stiles' office with the letter brought in to him by Mr. Bean. Witness stated that he remembered a talk about the City starting an injunction suit. The witness then testified as follows:

"Q. Now, Mr. Bean talked to you about what was to be done about supplying the Northern Pacific Railway Company while the suit went on, didn't he?

A. Yes, sir.

Q. That was one of the things you and he went down to talk with Judge Stiles about?

A. We went down to Judge Stiles' office really to discuss the matter, but so far as I was concerned I had nothing to do with it. I just simply went down there with him.

Q. Now, you did have quite a good deal of talk with him about what to do with the Northern Pacific Railway Company in the meantime?

A. Well, we talked about our current being a three-phase system and theirs being a two-phase system, yes.

Q. At that time you did not have the transformer capacity to take over the three-phase motors?

A. No, we had to buy them, of course.

Q. You did not have them on hand?

A. No, sir.

Q. Do you know when, or do you remember when, you got your three-phase transformers on hand?

A. After I left the office.

Q. Did you and Mr. Bean have any talk about the

(Testimony of Nicholas Lawson.)

Northern Pacific Railway Company power load being hooked up on the same circuits that the lights came from, that the Northern Pacific [73] Railway Company did not have a separate lighting system?

A. Well, the whole trouble was this: The Northern Pacific Railway Company wiring was such that they took the current and transformed it themselves, as I understand it, not in all places, but in some places and in the City of South Tacoma, it was clear. We could have taken South Tacoma right away, the lighting was clear.

* * * * * * * * *

Q. Well, now, didn't you talk with Mr. Bean in regard to its being better for the Tacoma Railway & Power Company to go ahead furnishing the Northern Pacific while the suit was going on about the matter? I do not mean that you made any agreement about it, but didn't you and he talk about it?

A. Well, we could not shut them off, that is one sure thing; they had to be served.

Q. And you could not serve them?

A. We did not have no transformers.

Q. You told Mr. Bean that?

A. We talked about that.

Q. You talked about their having to be served?

A. Yes, sir.

Q. Now, at this time, you spoke of my being there and Judge Stiles saying that the City had no suit to bring; that the Company would have to bring suit, do you remember when that was, Nick? Wasn't that pretty close to within a day or two of the time when

(Testimony of Nicholas Lawson.)

the suit was brought?

A. Yes, pretty close to it.

Q. That was towards the last?

A. Yes, sir. [74]

[Testimony of Owen Woods, for Defendant.]

OWEN WOODS was sworn and testified that in the summer of 1913 he was Commissioner of Public Works of the City of Tacoma. Said he told Mr. Bean that anything that had to be done would be done through the City Council, and that he talked matters over with Mr. Bean in regard to trouble at South Tacoma, and told Mr. Bean he could not enter into anything that the Council would not sanction. In answer to the question: "Do you remember Mr. Bean bringing to you or sending to you some form of a letter he wished to have you sign?" witness answered: "No, sir. The first I seen of them was when they were presented here."

[Testimony of B. W. Collins, for Defendant.]

B. W. COLLINS was sworn and testified that he is Superintendent of Electric Work of the City of Tacoma.

He testified that the Northern Pacific has at its shops in South Tacoma a large number of motors supplied with 220 volts two-phase current, and that the witness believes that the lighting therein is done by single phase current of 110 volts. That the current was brought in a central transformer station and transformed from about 13000 volts to about 2200 volts, two-phase. That the Railway Company

(Testimony of B. W. Collins.)

does its own distributing. Witness stated that two phase current is two single phase currents operating at a different phase angle, and that in three-phase current there are three single currents superimposed. That three-phase current would have to be transformed to two-phase current in order to be used in the Northern Pacific motors. That in order to transform to 2200 volts, it would take the time necessary to get equipment from the east, and would take about three weeks to build it, and about 26 days for shipment. [75]

That if the Tacoma Railway & Power Company had needed furnishing power to the Northern Pacific on the 15th day of April, 1913, the City could have furnished the Railway Company with current for lighting purposes within one or two days, and that the City had power at that time to spare. That aside from the shops at South Tacoma, the Northern Pacific used electricity at the Union Depot and the roundhouses and the motors and machinery in the roundhouses and in the electrical coal bunkers on the waterfront.

Witness further testified as follows: "A. At the Northern Pacific Railway Company Depot, the lighting and power is tied in together, so that to furnish lights it would have been necessary to furnish the power with them.

Q. How long would that have taken?

A. It would have required the getting the machinery from the east to have done that.

Q. Well, and the other lights?

A. Those at the roundhouse, or a greater portion

(Testimony of Owen Woods.)

of them could have been supplied almost immediately."

The witness further stated that if the arrangement under the resolution of June 21st in regard to the continuing of supply to the Northern Pacific by the Tacoma Railway & Power Company had not been made, the City would have taken immediate steps to have taken over the Northern Pacific load, and that the suit in the State Court was not finally terminated until some time after Mr. Lawson went out of office.

Witness further testified as follows: Q. After the termination of the litigation between the Tacoma Railway & Power Company and the City, what if anything [76] was done in the way of the City's taking over the power and lighting business of the Northern Pacific Railway Company?

A. The City did take it over.

Q. Is it operating it now? A. Yes, sir.

The plat showing the locations of wires and poles involving the ones in litigation, was admitted in evidence and marked Defendant's Exhibit "B."

[Testimony of T. L. Stiles, for Defendant.]

T. L. STILES, was sworn and testified that he is City Attorney for the City of Tacoma, and has held that office since 1908. Witness testified as follows: "Immediately after the passage of the resolution of April 2d, 1913, Mr. Bean came to the office,—I do not remember whether he was with Mr. Lawson or not, the first time, but his first talks were rather in a light way, "what are you going to do to us," and such talks as that and I answered in about the same way, but I

(Testimony of T. L. Stiles.)

do not believe anything of a serious character was said at all between that and the 15th day of the month. I told Mr. Bean at that or some other time that the resolution meant just what it said; that the City must have a cessation by the Tacoma Railway & Power Company of frunishing power for lighting; that there was nothing else in mind; that there was no expectation of taking the power business away, because there was no thought but that the Company would at once yield under the provisions of its franchise ordinance. After that time, and my impression would be that it was between the 15th and 21st Mr. Bean—I am not sure whether Judge Shackleford was there or not, but at least one of them was there and began to talk in a rather [77] roundabout way about what the Company's rights were and brought in the matter of the Public Service Acts, and I saw that there was an inclination on his part at any rate, to maintain that the Tacoma Railway & Power Company had a right to go on and do business in the City of Tacoma as it pleased, without any regard to the ordinances, and we had some little talk about that and I think I expressed my surprise that they should take that position, and it was upon that that the second resolution was passed. Mr. Lawson and the electricians, of course, as soon as the 15th had passed came right after me and wanted to know what should be done next in regard to getting possession of this lighting business, and as Mr. Lawson has said, the whole thing practically was thrown upon my shoulders, and I started out then with the intention

(Testimony of T. L. Stiles.)

of pushing the thing to a legal end, and I do not remember whether there was anything said about any law suit before the passage of this second resolution or not. There may have been, but there was no agreement or anything, any more than suggestions by either side. After the passage of that resolution, and I think Mr. Lawson was mistaken, that it was very soon afterward, within a day or so, Mr. Bean came, and I think that Judge Shackleford was with him then, and then I thought that they recognized the gravity of the situation, that the resolution meant probably what it said, and they began to talk about the City bringing a suit. I remember Mr. Bean saying it in just so many words: "I suppose the City will begin its suit pretty soon to enjoin us." Well, I listened to their talk for a little bit, and finally I turned around in my chair, "Mr. Bean, the City of Tacoma has no suit to bring"—I said it emphatically,—"the ordinance has been passed, and if there is any suit to [78] be brought, the Tacoma Railway & Power Company will bring it." I said that to, him, and I think Judge Shackleford was present then. I waited and waited and never supposed for a moment that those gentlemen would let their thirty days run without bringing suit. These letters came in occasionally and Mr. Lawson or somebody would come in, and I instructed Mr. Lawson to have nothing to do with it, because I believed at that time as I believe now, that those letters and the constant applications of one kind or another were for the purpose of getting something by which the City would be em-

(Testimony of T. L. Stiles.)

barrassed by its proceedings under this ordinance, and I was determined that it should not be so, and, as I say, I waited until the very 29th day, when this suit was commenced, and I looked at the complaint at once, and I saw that the usual restraining order didn't accompany it. I say usual, because it is perfectly well known that almost anything in the way of a complaint in all courts, has with it a temporary restraining order or an order to show cause. There was nothing of that kind in the complaint, nothing in the way of a temporary restraining order, and I saw at once that the thing was formed and framed so it should drag along and I was determined that it should not drag along, and I prepared and filed my answer the next day, and I have here a certified copy of the record in that case, and I ask leave to file it as Defendant's Exhibit "C."

The certified copy of the record was objected to as incompetent and not binding upon the plaintiff. Objection was overruled, and the copy of the record was marked Defendant's Exhibit "C."

Witness further testified: "The day that I defined the position of the [79] City was when I said to these gentlemen that if there was any suit to be brought, it must be brought by the Tacoma Railway & Power Company. Whenever that was, whether it was sooner or later, that was the time I defined my position, and I do not believe I was called upon to define it before, although as I say, there was suggestion and hints that the City would bring suit but I never gave it any weight whatever."

(Testimony of T. L. Stiles.)

"Previous to April 21st, there had been some discussion as to determining whether the Company had a right to furnish power which would be transformed by a customer into voltage sufficiently low for light. But that was not the only point the Company was insisting upon. It also insisted that under the Public Service Act it was relieved of all those conditions of the franchise ordinance.

Q. At first, was it not the claim of the Company that so long as the Company sold the electricity at a voltage too high for light, and as long as the customer transformed it into a sufficient power for lighting on his own premises, that the Company was doing no act forbidden by the franchise. Wasn't that the claim of the Company?

A. Yes, that was the first thing that was mentioned.

Q. You recognized did you not, the distinction between the Company testing its right to do that, and if it proved wrong, you recognized the distinction between forfeiting its franchise on account of that, and the proposition of the Company wilfully violating the franchise, didn't you?

A. To my mind there is nothing there except a legal wilfulness. Of course, there was no such thing as a wilful act of one man striking another, but it was wilful in the sense that the Company was determined to go on in spite of the [80] ordinance provisions as it had been theretofore.

Q. But the point was about transforming the

(Testimony of T. L. Stiles.)

power, it was that the Company really wanted to test that legal right.

A. I do not believe so. I think that the Company simply wanted to be let alone.

Q. Now, you say that you do not think the Company was going [81] to allow the 30 days to run out without the suit. Now, the Company if it brought suit within the 30 days, whether it got an injunction or whether it did not get an injunction, if it lost in its contention its franchise would ultimately be forfeited, would it not?

A. No, sir, not necessarily because at that time the City could not have insisted upon a forfeiture at that time, but the Company then by yielding the lighting proposition could have saved the rest of its franchise, by yielding the lighting business, not the rest of it.

Q. Before it had a judicial decision that it did not have the right to do that?

A. No, sir, it was after the judicial decision. We got a judicial decision in 13 days, and the question could have been decided in 13 or 14 or 15 days after the 23d day of April, as it was after the 23d day of May.

Q. Now, the resolution was served April 23d, and therefore the 30 days in which the Company occupied a place of repentance lasted until May 23d?

A. Yes, sir.

Q. And the Company brought the suit on the 22d day of May? A. Yes, sir.

Q. And then the answer came in on the 23d day of May, claiming the forfeiture? A. Yes, sir.

(Testimony of T. L. Stiles.)

Q. Now, don't you think, Judge Stiles, dealing as the Company was with you, for whom the Company had entire respect, that the Company would have assumed that on the 23d day of May, one day after that ran out, that the franchise would not be forfeited? Suppose you were dealing with me. Would you not [82] have thought so? You would not have expected me to claim a forfeiture.

A. You must remember that 30 days was the 30 days grace prescribed by the ordinance. The time really comes on the 2d day of April, when the first resolution was passed. That is my construction of it. As far as the 23d day of May is concerned,—the resolution was passed on that day. There is technicality. That day Mr. Bean had a copy of it and sent you a copy of it saying it would be passed that day. Mr. Woods did not formally serve it until two days later. I did not know until this matter came into litigation that it had not been served for two days after it was passed.

Q. Now, I am going to ask you a pretty broad question: Having read the correspondence which took place between Mr. Bean and the City officials, and Mr. Bean and myself, did you not really think we were all relying upon each other, even though we were mistaken, and that considering the people on both sides, that there was an honest mistake there?

A. I think the appearances was of an honest mistake on the part of Mr. Bean until after the resolution of the 21st of April, was passed, but I cannot see how anybody could have been mistaken after that.

(Testimony of T. L. Stiles.)

Q. Even though he believed that the understanding was that instead of the City bringing the suit that the Company was to bring the suit, and that that was for the purpose of the Company being able to allege the threat?

A. It may have been his idea of the proper way to proceed, but he could not have thought that from anything that happened between him and me.

Q. He may have been mistaken, but can you see any reason [83] why on the 21st day of April, he would have written to me to that effect to mislead me?

A. I cannot because he certainly had nothing from me upon that subject, and his construction of the language of the resolution is a plain negative of the whole tenor of the resolution. It either meant that I was perpetrating a sham, or that it meant what it said, one way or the other.

Q. Do you recall the conversation with Judge Shackleford in reference to a restraining order?

A. I think he is quite correct about that. If I may explain, as I said a while ago, we know that restraining orders are a matter of course. If he had asked for one I would not have objected to it, because I expected to have the case tried at once, and the City would not have been suffering from any injunction.

Q. And really if the case had been expedited so that there could have been a speedy determination of the right of the City to take over the business, you would not have had any idea of having the power franchise forfeited? A. No, sir.

(Testimony of T. L. Stiles.)

Q. And, as a matter of fact, the City did sustain no damage by reason of the Company doing that lighting business from the 23d day of May until the 22d day of June, that could not have been made whole for a few dollars?

A. As far as money went, there was no great loss.

Q. And the Company offered to pay that?

A. Not as I know of.

Q. If the offer was made, you mean that it was not made to you?

A. It was not offered to me." [84]

[Testimony of L. H. Bean, Recalled for Plaintiff.]

L. H. BEAN, was recalled as a witness and testified that the total expense of the Tacoma Railway and Power Company in producing the revenue of $30,000.00, would have been possibly $18,000.00, or in that neighborhood. That the total income from all sources of the Tacoma Railway and Power Company for the twelve months commencing November 30th, 1914, was $1,060,210.74; that that included income from power business. Witness testified that the interest on the mortgage bonds is paid by the fiscal agents of the Company, and that the treasurer of the Tacoma Railway & Power Company is located in Boston. He said he did not come prepared to state how much remittance was made to the Treasurer in Boston in 1914; that the rate of interest on the mortgage is 5%. He also stated that the total floating indebtedness of the Tacoma Railway & Power Company on November 30th, was $2,810,702.21, in the shape of notes bearing either 6 or 8 per cent interest,

payable semi-annually. Witness stated that there had been no actual default in the payment of interest, although the earnings had not been sufficient to pay the interest on its floating debt.

The witness gave the following figures for 12 months: "Gross earnings, $1,060,210.74; Operating expense, $758, 485.93; taxes; $85,220.24; interest charges, $274,855.66; leaving a net deficit of $58,351.-09. The interest on the floating debt was about $199,000.00. This sum does not include open accounts. Witness was not able to tell whether he had remitted to Boston $140,000.00 for the payment of interest on these notes, because it is necessary for the Company to carry a working balance, and witness stated that he would have to [85] look into the books to see what amount was actually remitted. That the working balance kept on hand usually runs from $50,000. to $100,000.00." [86]

[Order Directing Transmission of Original Exhibits, and Approving and Settling Statement of Evidence.]

United States of America,
Western District of Washington,—ss.

Now, on this 13th day of April, 1915, this cause coming on regularly before the Court upon application for the settling, certifying and approving of the proposed statement of the evidence, lately filed herein, and the time for such settling, approving and certifying of said statement having been duly extended by orders of the Court, and by the stipulation of the

parties, until and including this day, and the parties having agreed in regard to the said statement, and the amendments agreed upon having been incorporated and embodied in said statement pursuant to stipulation of the parties, and said statement having been written anew and it appearing that such statement contains the substance of all the testimony and evidence heard and taken at said trial, except certain exhibits introduced in evidence and marked Plaintiff's Exhibits 1 and 1–A, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21 and 22 and Defendant's Exhibits "A," "B" and "C," which said exhibits are hereby made a part of said statement, and [87] the clerk is hereby directed to send up the original exhibits as a part of the record.

IT IS FURTHER ORDERED that said statement filed in the cause as the same now stands amended as aforesaid, with the exhibits aforesaid be and it is hereby approved and settled as a true statement of the evidence in this cause, and the same as so settled and approved is hereby certified by the undersigned, a Judge of the said court, and said statement is made a part of the record on appeal in said cause.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Apr. 13, 1915. Frank L. Crosby, Clerk. By E. C. Ellington, Deputy. [88]

Judgment.

The above-entitled cause having come on to be heard on the 9th day of January, 1915, upon the bill, answer and proofs of the parties. Present: Mr. James B. Howe, for plaintiff, and Mr. T. L. Stiles, for defendant; thereupon was taken under advisement. And now, the Court having rendered and filed its decision adjudging that upon the pleadings and the evidence plaintiff is entitled to no relief herein.

IT IS ORDERED AND ADJUDGED that this action be dismissed and that defendant have judgment against plaintiff for its costs herein.

And it is FURTHER ORDERED that the injunction pending the action, heretofore ordered, be dissolved, unless kept in effect by appeal and supersedeas bond within ten days.

Entered February 2d, 1915.

EDWARD CUSHMAN,
District Judge.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [89]

Petition for Appeal.

The above-named plaintiff, Old Colony Trust Company, conceiving itself aggrieved by the final decree entered in the above-entitled cause, on the 2d day of February, 1915, hereby appeals from said final decree to the United States Circuit Court of Appeals

for the Ninth Circuit, and prays that this its appeal from said final decree to the United States Circuit Court of Appeals be allowed, and that a transcript of the record and proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals. The said Old Colony Trust Company, plaintiff and appellant, has filed herein its assignment of errors, setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals upon said appeal.

And your petitioner will ever pray, etc.

OLD COLONY TRUST COMPANY,
Appellant.
By JAMES B. HOWE and
JNO. A. SHACKLEFORD,
Its Solicitors.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [90]

Order Allowing Appeal.

On motion of James B. Howe and John A. Shackleford, solicitors for the above-named plaintiff, and upon the filing and presentation of a petition for an appeal from the final decree entered herein on the 2d day of February, 1915, and an assignment of errors duly filed herein, it is

ORDERED that the appeal prayed for be and the same is hereby allowed from said final decree to the

United States Circuit Court of Appeals for the Ninth Circuit;

And it is FURTHER ORDERED that the amount of the bond upon said appeal be and the same is hereby fixed in the sum of Twenty-five Thousand dollars ($25,000.00).

It is FURTHER ORDERED that the temporary injunction upon the approval of said bond heretofore granted shall remain in force until the final hearing and determination of the cause on appeal.

It is FURTHER ORDERED that a certified transcript of the record and proceedings herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of February, 1915.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [91]

Assignment of Errors.

Now comes Old Colony Trust Company, plaintiff in the above-entitled cause, and files the following assignment of errors, upon which it will rely on its appeal from the decree entered herein on the 2d day of February, 1915, in the above-entitled cause.

The United States District Court for the Western District of Washington, Southern Division, which entered a decree of dismissal in the above-entitled cause erred as follows:

I.

The Court erred in holding that any ground existed or was proved authorizing the forfeiture of the franchise granted by Ordinance No. 2295 of the City of Tacoma.

II.

The Court erred in holding that the sale of electric current by Tacoma Railway & Power Company to Northern Pacific Railway Company at a voltage too high to be used for lighting purposes, and the transformation of such current to a lower voltage by the Northern Pacific Railway Company, and the use of such current by Northern Pacific Railway Company on its own premises, for lighting purposes, constituted a ground of forfeiture of such franchise.

III.

The Court erred in holding that the proceedings of the City of Tacoma to forfeit such franchise, had and taken without notice to Old Colony Trust Company, could be effectual to forfeit such franchise or any rights of Old Colony Trust Company.

IV. [92]

The Court erred in holding that Old Colony Trust Company as trustee lost any rights in such franchise or in the property used under such franchise by reason of any proceedings on the part of the City of Tacoma.

V.

The Court erred in holding that the franchise granted by Ordinance No. 2295 of the City of Tacoma was subject to forfeiture by reason of the sale of electric power by the Tacoma Railway & Power Company to the Northern Pacific Railway Company before or after the 22d day of April, 1913.

VI.

The Court erred in holding that Old Colony Trust Company was not entitled to relief restraining the City of Tacoma from asserting forfeiture of the franchise granted by Ordinance No. 2295, and also restraining the City of Tacoma from asserting title to or interfering with the poles and wires used thereunder.

VII.

The Court erred in construing Ordinance No. 2295 as authorizing the forfeiture of the franchise granted thereby because of a sale of electric current used for lighting purposes.

VIII.

The Court erred in holding that the City of Tacoma had power, by its charter or by ordinance, to prevent itself from granting a franchise for the sale of electric power for lighting purposes.

IX.

The Court erred in holding that the acts of the City of Tacoma and of its officials in reference to the forfeiture of the franchise granted by Ordinance No. 2295 were not sufficient [93] to justify the officials of the Tacoma Railway & Power Company in believing that the franchise would not be forfeited for the

sale of power by the Company to the Northern Pacific Railway, and were not sufficient to estop the City of Tacoma from claiming such forfeiture.

X.

The Court erred, after holding that the Tacoma Railway & Power Company did believe that such franchise would not be forfeited by the City of Tacoma pending litigation thereover, is not holding that the acts of the City of Tacoma and its officials did not estop the City of Tacoma from claiming such forfeiture, and also erred in not holding that such forfeiture, if allowed, would be the result of error and mistake.

XI.

The Court erred in not entering a decree in the case in favor of the plaintiff as prayed in the Bill of Complaint.

XII.

The Court erred in rendering and entering a decree dismissing the cause.

XIII.

The Court erred in not holding that to adjudge a forfeiture of the franchise granted by Ordinance No. 2295 because of a sale by the Tacoma Railway & Power Company of electric current to the Northern Pacific Railway Company at a voltage too high to be used for lighting purposes and a transformation of such current by the Northern Pacific Railway Company upon its own premises to a voltage sufficiently low for lighting purposes, and the use thereof or some portion of such power by the Northern Pacific Railway Company was not a ground of forfeiture, and

that a forfeiture under such circumstances would [94] deprive plaintiff of its property without due process of law and deny to it the equal protection of the law, in contravention of the Fourteenth Amendment of the Constitution of the United States, and in contravention of the Constitution of the United States.

XIV.

The Court erred in holding that the rights of the plaintiff in the franchise granted by Ordinance No. 2295 of the City of Tacoma, and in the property used thereunder, could be taken from the plaintiff without notice to or any proceeding against the plaintiff.

XV.

The Court erred in not holding that to deprive the plaintiff of the relief prayed for in the Complaint, because of acts not done by the plaintiff and without any notice or knowledge on the part of the plaintiff, would deprive the plaintiff of its property without due process of law.

WHEREFORE, in order that the foregoing Assignment of Errors may be and appear of record, the plaintiff presents the same to the Court, and prays that such disposition be made thereof as is in accordance with the law and statutes of the United States in such cases made and provided; and plaintiff prays that said decree of dismissal be reversed, and that a decree in favor of the plaintiff be entered by the Court.

JAMES B. HOWE,
JNO. A. SHACKLEFORD,
Solicitors for Plaintiff.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [95]

Bond on Appeal.

WHEREAS, plaintiff in the above-entitled cause procured a temporary injunction against the defendant and whereas, the said plaintiff has appealed from the judgment entered in said cause, to the Circuit Court of Appeals, and;

WHEREAS, in the order allowing an appeal it is provided that plaintiff furnish a bond in the sum of $25,000.00, and that upon the approval of said bond said temporary injunction should remain in force until the final hearing and determination of this cause upon appeal.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS: That we, Old Colony Trust Company, a corporation, plaintiff in the above-entitled cause, as principal, and UNITED STATES FIDELITY & GUARANTY COMPANY, as surety, acknowledge ourselves to be jointly and severally indebted to the City of Tacoma, the defendant in the above-entitled cause, in the sum of $25,000.00. Now, if the said Old Colony Trust Company, appellant, shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, and if said Old Colony Trust Company pay all damages and costs which may accrue by reason of the temporary injunction heretofore issued in said cause,

and by reason of said temporary injunction remaining in force until the final hearing and determination of this cause upon appeal, then this obligation shall be void, otherwise to remain in full force and effect, and the said surety hereby expressly agrees that in case of a breach of any condition of this bond, the District Court of the United States for the Western District of Washington, Southern Division, may, upon notice to it of not less than ten days, proceed summarily in the action in which [96] this bond is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety, and to award execution therefor.

Tacoma, Wn., Febry, 2d, 1915.

OLD COLONY TRUST COMPANY.
By JNO. A. SHACKLEFORD,
Its Attorney,
Principal.

[Seal of Surety Co.]

UNITED STATES FIDELITY & GUARANTY CO.
By HARRY C. MILLER,
Surety.

Approved:

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy. [97]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return the foregoing to be a full, true, and correct copy of the record and proceedings in the above-entitled cause as the same remain on file and of record in my office, in said District, at Tacoma, pursuant to the stipulation of counsel herein filed.

I further certify that I attach hereto and herewith transmit the original Citation and original Order extending time for Record on Appeal, and under separate cover and certificate I transmit original exhibits herein.

I further certify that the following is a full, true and correct statement of all expenses, costs and fees, and charges incurred and paid in my office by or on behalf of the appellant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit:

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 237 folios @ 15¢	$ 35.55
Certificate of Clerk to transcript of record 2 folios @ 15¢	.30
Seal to said certificate	.20

Certificate of Clerk to original exhibits folios @ 15¢ ..... .15
Seal to said Certificate ..... .20

$ 36.40

[98]

IN WITNESS WHEREOF, I have hereunto set my hand and the seal of the said District Court, at Tacoma, in said District, this 13th day of April, A. D. 1915.

FRANK L. CROSBY,
Clerk.
By E. C. Ellington,
Deputy Clerk. [99]

In the District Court of the United States for the Western District of Washington, Southern Division.

No. ——.

OLD COLONY TRUST COMPANY,
Plaintiff,

vs.

THE CITY OF TACOMA,
Defendant.

Citation.

The United States of America, to the City of Tacoma and T. L. Stiles, its Solicitor, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, in the City of San Francisco, California, within thirty (30) days from and

after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the District Court of the United States, for the Western District of Washington, Southern Division, wherein Old Colony Trust Company is appellant and you, the City of Tacoma, are appellee, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Southen Division, this 2d day of February, 1915.

[Seal] EDWARD E. CUSHMAN,
United States District Judge for the Western District of Washington. [100]

Due and proper service of the above and foregoing Citation is hereby accepted and acknowledged, this 2d day of February, 1915.

T. L. STILES,
Solicitor for the City of Tacoma, Defendant and Appellee.

[Endorsed]: No. 18—E. In the United States District Court, Western District of Washington, Southern Division. Old Colony Trust Co., Plaintiff, vs. City of Tacoma, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Southern Division. Feb. 2, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. ——.

OLD COLONY TRUST COMPANY, a Corporation,

Appellant,

vs.

CITY OF TACOMA,

Appellee.

Order [Extending Time to File Statement of Evidence, and to File Record in Appellate Court].

Upon stipulation of the parties to this cause, it is ORDERED that the time for serving and filing the statement of the evidence in this cause be extended thirty days from the date of this order, and that the time for settlement of such statement be extended forty days from the date of this order, and that the time for filing the record in this cause in the Circuit Court of Appeals be extended sixty days from the date of this order.

Dated this 24th day of February, 1915.

EDWARD E. CUSHMAN,
Judge. **[101]**

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, 9th Circuit. Old Colony Trust Company, Appellant, vs. City of Tacoma, Appellee. Order. Filed in the U. S. District Court, Western District of Washington, Southern Division. Feb. 24, 1915. Frank L. Crosby, Clerk. By F. M. Harshberger, Deputy.

[Endorsed]: No. 2601. United States Circuit Court of Appeals for the Ninth Circuit. Old Colony Trust Company, as Trustee, Appellant, vs. The City of Tacoma, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed April 16, 1915.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.